Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

EILEEN CHEEVER; ANTHONY COSTANZO; MARY ANN DIEBOLD; ROSEMARY GIBSON; EDITH NEIL; MARILYN NUSS; SUSAN OIKELMUS,
PETITIONERS

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, as the Administrator of the John Hancock Mutual Life Insurance Company Pension Plan,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To ensure that ERISA plan administrators do not deny promised benefits by interposing strained readings of technical plan language, Congress requires plan sponsors to prepare and distribute a Summary Plan Description ("SPD") that provides "the essential information about the plan" and that is "written in a manner calculated to be understood by the average plan participant." The SPD serves as an important legal check on plan administrators, because any denial of benefits will be judicially measured against the plain language of the relevant plan documents – including the applicable SPD. In this way, SPDs promote ERISA's general purpose "to protect . . . the interests of participants in employee benefit plans," and in enforcing ERISA's Anti-Cutback Statute, which prohibits the denial of accrued pension benefits.

The First Circuit has now vitiated this important check on benefit denials and cutbacks. Describing the applicable SPD and other record evidence as "extraneous documents . . . irrelevant to our determination" of the meaning of the plan, the First Circuit held that the District Court committed legal error by considering the applicable SPD in reviewing an employer's refusal to pay pension benefits that had accrued under the plain terms of the SPD. Legally, this decision contradicts the Anti-Cutback Statute and creates a bare conflict with the other Circuits, which routinely consider the SPDs during judicial review. Practically, the decision invites cash-strapped, or profit-maximizing, plan sponsors to revisit technical plan documents and come up with new interpretations to rescind benefits promised in the SPDs (and elsewhere), thus arming these sponsors with a potent weapon in what the Third Circuit has called "corporate America's recent effort to curb costs by . . . scaling back the benefits provided under pension plans."

Thus, the question is presented: Did the First Circuit contravene the Anti-Cutback Statute (29 U.S.C. 1054(g)) and other provisions of ERISA by holding – contrary to rulings in every other Circuit – that the District Court committed legal error by considering the plain language of the applicable Summary Plan Description in judicially reviewing a plan administrator's decision to deny pension benefits?

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OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit (Pet. App. 1a-18a) is recorded at 400 F.3d 83 (1st Cir. 2005). The Order of the First Circuit denying the petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 41a-42a) is unreported. The Memorandum and Order on Cross-Motions for Summary Judgment rendered by the District Court for the District of Massachusetts (Pet. App. 19a-40a) is unreported.

JURISDICTION

The District Court exercised subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as this case is based upon one or more causes of action arising under the laws of the United States, including Section 502(a) of the Employment Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1132(a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Appendix (Pet. App. 48a-52a) reproduces the texts of 29 U.S.C. § 1054(g) (the "accrued benefit of a participant under a plan may not be decreased by . . . eliminating or reducing an early retirement benefit"), 29 U.S.C. §§ 1022 and 1024(b) (requiring issuance of SPDs "written in a manner calculated to be understood by the average plan participant," including as concerns anything that might result in "denial or loss of benefits"), and 29 U.S.C. § 1132(a)(1)(B) (authorizing claims for pension benefits wrongly withheld).

STATEMENT OF THE CASE

To ensure that ERISA plan administrators do not deny promised benefits by interposing strained readings of technical plan language, Congress requires plan sponsors to prepare and distribute a Summary Plan Description ("SPD") that provides "the essential information about the plan" and that is "written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a)(1). The SPD has served as an important legal check on plan administrators because any denial of benefits will be judicially measured against the plain language of the relevant plan documents – including the applicable SPD. In this way, SPDs play a crucial role in promoting ERISA's general purpose "to protect . . . the interests of participants in employee benefit plans," 29 U.S.C. § 1001(b), and in enforcing ERISA's Anti-Cutback Statute, 29 U.S.C. § 1054(g), which prohibits the denial of accrued pension benefits.

The First Circuit has now vitiated this important check on benefit denials and cutbacks. Describing the applicable SPD and other record evidence as "extraneous documents . . . irrelevant to our determination" of the meaning of the plan, the First Circuit held that the District Court erred by considering the applicable SPD in reviewing an employer's refusal to pay pension benefits that had accrued under the plain terms of the SPD. Pet App. 10a, 13a-16a. Legally, this decision contradicts the Anti-Cutback Statute and creates a bare conflict with the other Circuits, which routinely consider the SPDs during judicial review. Practically, the decision invites cash-strapped, or profit-maximizing, plan sponsors to

revisit plan documents and craft technical readings to rescind promised benefits, thus arming these sponsors with a potent weapon in what the Third Circuit has called "corporate America's recent effort to curb costs by . . . scaling back the benefits provided under pension plans." *Depenrock v. Cigna Corp.*, 389 F.3d 78, 79 (3d Cir. 2004).

A. Procedural Background

On October 11, 1994, Respondent John Hancock Life Insurance Company ("Hancock") amended its Pension Plan to, *inter alia*, allow employees with 25 years of service at Hancock to retire early with an unreduced pension at age 56, rather than 65. Pet. App. 57a-58a. Hancock subsequently denied this enhanced early retirement benefit to Petitioners despite their 25 years of service, because they would not also reach age 50 when their employment would involuntarily terminate in March 1997. Hancock based its denial upon a post-claim interpretation of a single technical plan document that had not been distributed to Petitioners.

On September 17, 1999, Petitioners commenced this case in United States District Court for the District of Massachusetts. On March 30, 2001, Petitioners filed a First Amended Complaint stating the following three claims: (1) Count I – Benefits Wrongly Withheld, ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B); (2) Count II – Breach of Fiduciary Duty, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3); and (3) Count 3 – Estoppel, ERISA common law.

On June 14, 2002, the District Court granted summary judgment in favor of Petitioners on Count I, ruling that Hancock's post-claim interpretation of the plan was unreasonable, especially when placed in context with the applicable SPDs and other record evidence. *See* Memorandum and Order on Cross-Motions for Summary Judgment (June 14, 2002), Pet. App. 19a-40a.

On March 10, 2005, a panel of the First Circuit reversed and granted summary judgment to Hancock on Count I, ruling that the District Court had committed an error of law by reviewing the applicable SPDs and other contemporaneous record evidence, as only the technical plan document (*i.e.*, the 1995 Restatement) was relevant under ERISA Section 502(a)(1)(B). *See Fenton v. John Hancock Mutual Life Ins. Co.*, 400 F.3d 83 (1st Cir. 2005), Pet. App. 1a-18a. In remanding for further proceedings under Counts II and III, the First Circuit instructed that "reliance may be relevant" to those claims, Pet. App. 16a, but noted a conflict between the First Circuit and other Circuit Courts of Appeal on the reliance question, Pet. App. 8a.

On April 14, 2005, the First Circuit denied Petitioners' petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 41a-42a.

B. Statement of Facts

On October 11, 1994, Hancock amended its Pension Plan to, *inter alia*, allow employees with 25 years of service to retire early with an unreduced pension at age 56, rather than 65, commencing on January 1, 1995. Pet. App. 57a-58a.

After approving the October 11, 1994 amendment, Hancock launched a blitz of communications to inform employees of the change, including as follows:

(a) The 1995 Summary Plan Description Update. "You can now receive an *unreduced* pension benefit when you are: ➢Age 56 or older with 25 years of service, if you were born before 1955." Pet. App. 53a-56a.

(b) The Company Forum. On October 20, 1994, Hancock Chairman and CEO Stephen Brown personally announced the 1994 Amendment to all employees, describing it as a "liberalization" and promising that early "unreduced pension benefits will be available for anyone with at least 25 years of service." Pet. App. 65a-70a.

(c) The Brown Letter. On October 20, 1994, Hancock distributed a letter from CEO Brown, stating: "Unreduced Pension. If you have 25 or more years of service, you may retire with an unreduced pension as early as age 56." Pet. App. 59a-61a.

(d) The Early Retirement Guide. Attached to the Brown letter was an official booklet entitled "A Guide to the Early Retirement Options Under the Pension Plan," which stated: "You can now receive an UNREDUCED pension

> benefit when you are: ➢Age 56 or more with 25 years of service." [Emphasis in original.] Pet. App. 62a-64a.

Petitioners are former long-term employees of Hancock whose employment involuntarily terminated in March 1997, when Hancock sold their employing unit. At the time they learned of the prospective sale in December 1996, each Petitioner had already accrued, or with severance would accrue, 25-five years of service at Hancock.[1]

Petitioners submitted timely claims for an unreduced pension at age 56. Hancock denied the claims *en masse*, deeming Petitioners ineligible because (due to the prospective sale) they would not remain actively employed at Hancock at age 50. Hancock based its denial upon a post-claim interpretation of a technical plan document that had not been distributed to Petitioners. Prior to receiving the denial, Petitioners understood that 25 years of service was the sole eligibility criterion for Enhanced Benefits.

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[1]Petitioner Mary Ann Diebold would have reached 25 years of service had she taken severance, but she chose not to do so (and to instead go to work for the new company) because Hancock insisted that she would not qualify for the Enhanced Benefit either way.

REASONS FOR GRANTING THE WRIT

A. District Courts Should Be Allowed To Consider The Applicable Summary Plan Descriptions (SPDs) When Reviewing Claims Under ERISA § 502(a)(1)(B).

The First Circuit's unprecedented ban of Summary Plan Descriptions ("SPDs") from ordinary judicial review under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), allows employers to interpose a post-claim interpretation of the technical plan document in order to rescind pension benefits that have already accrued. This plainly conflicts with ERISA's Anti-Cutback Statute, and the detailed provisions governing SPDs. The First Circuit has thus created an unlawful method for employers to deny valuable pension benefits long after they were promised and earned. *See, e.g., Depenbrock v. Cigna Corp.*, 389 F.3d 78, 79 (3d Cir. 2004) ("This case is a by-product of corporate America's recent effort to curb costs by, inter alia, scaling back the benefits provided under pension plans.").

This issue is ripe for resolution. The First Circuit has jeopardized the core purpose of ERISA to protect plan participants against wrongful benefit forfeitures, and in doing so has departed from the other Circuits, which routinely consider the applicable SPDs as part of the judicial review record.

1. ERISA Was Enacted To Protect Accrued Pension Benefits, And The Anti-Cutback Statute Is In Service To This Basic Purpose.

ERISA is a "comprehensive and reticulated statute," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989), *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), that was "enacted 'to protect . . . the interests of participants in employee benefit plans and their beneficiaries.'" *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6 (2004), *quoting* 29 U.S.C. § 1001(b). ERISA is primarily "addressed to the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from their working lives." S. Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838. ERISA thus "seek[s] to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

"There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004), *citing* (*inter alia*) J. Langbein & B. Wolk, *Pension and Employee Benefit Law* 121 (3d ed. 2000). Giving teeth to this purpose, the Anti-Cutback Statute in ERISA bars plan sponsors and administrators from changing the plan to rescind benefits that have already accrued, including "early

retirement" benefits that have accrued based on years of "service":

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . .(2) For the purposes of paragraph (1), a plan amendment which has the effect of – (A) eliminating or reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

ERISA Section 204(g), 29 U.S.C. § 1054(g). *See Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1143-46 (3d Cir. 1993) (discussing statute and its history), *cert. denied*, 511 U.S. 1004 (1994).

The Anti-Cutback Statute is "crucial to this object" of preserving promised benefits, including "early retirement benefits." *Central Laborers' Pension Fund*, 541 U.S. at 744, *citing* Retirement Equity Act of 1984, § 301(a), (2), 98 Stat 1451. The provision "flatly prohibits plans from attaching new conditions to benefits that an employee has already earned," or imposing a "new condition . . . after a benefit has accrued," *id.* at 746-47, and bars any change that reduces the value of an early retirement benefit "that was **earned by service** before the amendment was passed." *Id.* at 744 (emphasis added). *Accord Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1036-37 (7th Cir. 1996) (employees "who complain about a cut-back of early retirement benefits have stated a claim under § 204(g), as long as each employee satisfies (either before or after the plan amendment) the relevant eligibility requirements in place at the time of the amendment").

2. SPDs Are Important "Plan Documents" That Inform Participants Of Their Rights And Benefits Under The Plan.

ERISA requires benefits plans to be in writing so that a participant "may, on *examining the plan documents*, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (emphasis in original), *quoting* H.R. Rep. No. 93-1280, p. 297 (1974). The requirement for "written plan documents" is central to ERISA, *id.* at 83, and SPDs are one of the most important "plan documents":

> ERISA gives effect to this "written plan documents" scheme through a comprehensive set of "reporting and disclosure" requirements, *see* 29 U.S.C. §§ 1021-1031 . . . . One provision, for example, requires that plan administrators periodically furnish beneficiaries with a Summary Plan Description, *see* 19 U.S.C. 1024(b)(1), the purpose being to communicate to beneficiaries the essential information about the plan.

Id. at 83. *See Bergt v. Ret. Plan for Pilots Employed by Mark Air*, 293 F.3d 1139, 1143 (9th Cir. 2002) (the SPD "is a plan document"); *Jensen v. SIPCO, Inc.*, 28 F.3d 945, 949 (8th Cir. 1994) ("SPDs are considered part of the ERISA plan documents"), *cert. denied*, 514 U.S. 1050 (1995).

SPDs are the primary means for informing participants of their rights and benefits under the plan.

See, e.g., Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found., 334 F.3d 365, 379 (3d Cir. 2003) ("as Congress intended, the SPD is the primary document on which plan participants must rely"); *Mario v. P&C Food Mkts., Inc.*, 313 F.3d 758, 764 (2d Cir. 2002) ("the SPD is an employee's primary source of information regarding employment benefits") (citations omitted). Accordingly, ERISA specifies the detailed requirements for SPDs, including:

- SPDs "'shall be written in a manner calculated to be understood by the average plan participant.'" *Curtiss-Wright Corp.*, 514 U.S. at 83-84, *quoting* 29 U.S.C. § 1022(a)(1).

- SPDs "must be sufficiently accurate and comprehensive to apprise participants . . . of their rights and obligations under the plan." *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003), *citing* 29 U.S.C. § 1022(a).

- SPDs must "contain the plan's eligibility requirements for benefits as well as 'the circumstances which may result in disqualification, ineligibility or denial or loss of benefits.'" *Id.*, *citing* 29 U.S.C. § 1022(b) and 29 C.F.R. § 2520.102-3(l).

- SPDs must "not mislead or fail to inform participants . . . about the plan; and [] any limitations or restrictions of plan benefits must not be minimized, rendered obscure

or otherwise made to appear unimportant." *Id.*, *citing* 29 C.F.R. § 2520-102-2(b).

3. In Other Circuits, SPDs Are Routinely Considered During Judicial Review Under ERISA § 502(a)(1)(B).

Until now, the Circuit Courts of Appeal have routinely reviewed the applicable SPDs as one of the relevant plan documents – if not the key plan document – when addressing claims for withheld benefits under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The following are representative Circuit Court rulings:

> **Second Circuit**: "Where the terms of a plan and the SPD conflict, the SPD controls." *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003), *citing Heidgerd* v. *Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990).
>
> **Third Circuit**: "[W]here a summary plan description conflicts with the [technical] plan language, it is the [SPD] that will control." *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 378 (3d Cir. 2003).
>
> **Fourth Circuit**: The SPD is the "governing plan document." *Kress v. Food Employers Labor Relations Assn.*, 391 F.3d 563, 566 (4th Cir. 2004).

Fifth Circuit: "We have already noted that here the SPDs are the only substantive plan documents." *Tolson v. Avondale Industr.*, 141 F.3d 604, 609 (5th Cir. 1998).

Sixth Circuit: "[T]he language of SPDs is binding, and where there is a conflict between the language of the SPD and the other official plan documents, it is the SPD which is controlling." *Helwig v. Kelsey-Hayes*, 93 F.3d 243, 250 (6th Cir. 1996), *citing Edwards v. State Farm Mutual Auto. Ins., Co.*, 851 F.2d 134, 136 (6th Cir. 1987).

Seventh Circuit: SPDs are governing plan documents, *Neuma, Inc. v. AMP, Inc.*, 259 F.3d 864, 873-74 (7th Cir. 2001), that provide "a presumptively reliable guide to the contents of the plan itself." *Matthews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998), *cert. denied*, 525 U.S. 1054 (1998).

Eighth Circuit: "SPDs are considered part of the ERISA plan documents." *Jensen v. SIPCO, Inc.*, 28 F.3d 945, 949 (8th Cir. 1994).

Ninth Circuit: The SPD "is a plan document and should be considered when interpreting an ERISA plan." *Bergt v. Ret. Plan for Pilots Employed by Mark Air*, 293 F.3d 1139, 1143 (9th Cir. 2002).

Tenth Circuit: SPDs are plan documents that "give employees an understanding of the plan upon which they are entitled to rely." *Chiles v.*

Ceridian Corp., 95 F.3d. 1505, 1518 (10th Cir. 1996) (technical "master plan document" also is "relevant" to meaning of the plan).

Eleventh Circuit: The SPD prevails over technical plan, as it is "of no effect to publish and distribute [an SPD] designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan." *McKnight v. S. Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985).

Because the Anti-Cutback Statute protects benefits under the plan in effect at the time of accrual, judicial review is focused upon the SPD in effect at that earlier time:

> We agree with the district court that the controlling document is the 1999 [and not the 2003] SPD. "Because plan administrators have an obligation imposed by ERISA to operate the plan according to current plan documents, a *post hoc* amendment clearly cannot alter a plan provision in effect at the time performance under the plan became due . . . . [¶] . . . Plaintiffs' benefits were vested prior to the effective date of the 2003 SPD."

Gorman v. Carpenters' & Millwrights' Health Benefit Trust Fund, No. 03-1526, 2005 U.S. App. LEXIS 10606 at ** 8-9 (10th Cir. June 8, 2005), *quoting Member Servs. Life Ins. Co. v. Am. Nat'l Bank and Trust Co.*, 130 F.3d 950, 957 (10th Cir. 1997).

The centrality of SPDs during judicial review is both sensible and consistent with ERISA. It is sensible because it ensures that employees are not deceived by SPDs that promise benefits which, after accruing, are then rescinded through the expedient of a post-claim interpretion of the language in a technical plan document. It is also consistent with ERISA, which requires employers to explain arcane plan provisions through readable and accurate SPDs, *see* 29 U.S.C. § 1022(a)(1), and prohibits employers from cutting back on accrued benefits, *see* 29 U.S.C. § 1054(g).

4. The First Circuit Has Split From The Other Circuits.

In rejecting Hancock's denial of Petitioners' claims for the Enhanced Benefit, the District Court reviewed the entire record, including the technical plan document (*i.e.*, the 1995 Restatement) relied upon by Hancock in denying the claim, the 1994 Amendment itself (Pet. App. 57a-58a), the updated SPD that explained the 1994 Amendment to participants (Pet. App. 53a-56a), and other contemporaneous evidence (Pet. App. 65a-70a; 59a-61a; 62a-64a). Pet. App. 20a-32a. The District Court especially emphasized the plain terms of the updated SPD. Pet. App. 31a ("The unambiguous language of the SPD is devastating to Hancock's position").

In reversing, the First Circuit did not question the accuracy of the District Court's record review, but instead held that it had legally erred under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), by considering anything from the record other than the technical plan document. Pet. App. 7a-11a. According

to the First Circuit, the updated SPD and other contemporaneous evidence were "extraneous documents . . . irrelevant to our determination of [Petitioners'] right to relief." Pet. App. 10a (SPDs and other record items likened to "extrinsic evidence").[2] Certainly, this ruling cannot be reconciled with the approach taken in the other Circuits (*see* Subsection 3, above).

5. The First Circuit Has Split From Itself.

The First Circuit's decision also creates an internal conflict within the Circuit. In *Glista v. UNUM Life Ins. Co.*, 378 F.3d 113 (1st Cir. 2004), the plaintiff filed suit under ERISA Section 502(a)(1)(B) for wrongful denial of disability benefits. Ruling in favor of the plaintiff-employee, the First Circuit called for a case-by-case evaluation of plan-related documents, finding relevant and admissible those documents containing the plan administrator's prior interpretations of the plan:

> Such documents are most likely to be relevant where they have been authenticated, have been generated or adopted by the plan administrator, concern the policy in question, are timely to the issue in the case, are consistently used, and were known . . . by those who made the decision to

[2]The First Circuit seemed to leave the door open for the SPD to be considered if needed to resolve an ambiguity within the technical plan document. Pet. App. 10a. The record here proved multiple ambiguities or inconsistencies, *see, e.g.*, Pet. App. 35a, but they were summarily rejected without explanation by the First Circuit.

> deny the claim. Where a plan administrator has chosen consistently to interpret plan terms in a given way, that interpretation is relevant in assessing the reasonableness of the plan administrator's decision.

Id. at 123, *citing Doe v. Travelers Ins. Co.*, 167 F.3d 53, 57 (1st Cir. 1999). *Cf. Hicks v. Fleming Cos.*, 961 F.2d 537, 542 n. 18 (5th Cir. 1992) ("We stress that our holding does not mean that a document, which does not constitute an SPD under the test articulated in this case, cannot be some other type of plan document under ERISA.").

Here, the First Circuit forewent the document-by-document inspection it had prescribed in *Glista*. The updated SPDs and other evidence the First Circuit barred the District Court from considering in this case plainly would have passed the *Glista* test, as they contained Hancock's official reading of the pension plan at the time the benefits accrued under that interpretation. The documents were thus "relevant in assessing the reasonableness of the plan administrator's decision," and their *per se* ban in this case cannot be reconciled with *Glista*.

6. This Case Exemplifies The Harm To ERISA.

This case exemplifies the harm promised by the First Circuit's rejection of SPDs as relevant plan documents available for ordinary judicial review under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

Upon achieving 25 years of service, each Petitioner accrued the right to receive an unreduced pension at age 56 (the "Enhanced Benefit"), and earned the protection of the Anti-Cutback Statute. *See, e.g., Campbell v. BankBoston*, 327 F.3d 1, 8 (1st Cir. 2003) ("The ERISA anti-cutback provision protects against the erosion of 'accrued benefits'"); *Bellas v. CBS, Inc.*, 221 F.3d 517, 524 (3d Cir. 2000) ("There is no question but that a standard early retirement benefit, provided exclusively upon the satisfaction of certain age and/or service requirements, is an accrued benefit that is protected by" the Anti-Cutback Statute.).

Upon learning that their employment would soon be involuntarily terminated, each Petitioner applied for the Enhanced Benefits based on her 25 years of service. In denying their claims, Hancock exclusively relied upon a new interpretation of a single technical plan document (*i.e.*, the 1995 Restatement).

The District Court carefully reviewed the entire record, and found Hancock's new interpretation of the technical plan document to be untenable:

> The Administrator's interpretation . . . renders substantial portions of §§ 4.3(B) and 8.1(A) superfluous and imports a definition of 'employee' that is inconsistent with its use elsewhere in the Plan. It is further inconsistent with the reading given to the Plan by Hancock's own CEO and its Human Resources Department [in the SPDs and elsewhere] . . . . [O]bstinacy in error is the soul of capriciousness.

Pet. App. 35a. *Accord Herzberger v. Standard Ins. Co.*,

205 F.3d 327, 332-33 (7th Cir. 2000) ("An employer should not be allowed to get credit with its employees for having an ERISA plan that confers solid rights on them and later, when an employee seeks to enforce the right, pull a discretionary judicial review rabbit out of his hat"); *Williams v. Cordis Corp.*, 30 F.3d 1429, 1431 (11th Cir. 1994) (the Anti-Cutback Statute "prevent[s] employers from 'pulling the rug out from under' employees participating in a plan")

The record overwhelmingly supports the District Court. The October 11, 1994 Amendment identified 25 years of service as the sole eligibility criterion for the Enhanced Benefit. Pet. App. 57a-58a. On October 20, 1994, Hancock convened a company-wide forum, where its Chairman and CEO Stephen Brown stated the 1994 Amendment was a "liberalization" promising that "unreduced pension benefits will be available for anyone with at least 25 years of service." Pet. App. 66a. Also on October 20, 1994, CEO Brown distributed a letter to all participants confirming that the Enhanced Benefit would be available to any employee "with twenty-five or more years of service." Pet. App. 59a-60a. The Brown letter attached an official-looking document entitled "Early Retirement Guide," which further emphasized the point: "You can now receive an unreduced pension benefit when you are: ➢ Age 56 or older with 25 years of service, if you were born before 1955." Pet. App. 64a. And most importantly, Hancock issued an updated SPD, which provided (in relevant part):

> **ELIGIBILITY FOR EARLY RETIREMENT – Revised 1/1/95**
> (see pages PP-4 through PP-6 of *Your Benefits*

Program)

For retirements or terminations on or after January 1, 1995, the eligibility requirement for early retirement with either an unreduced or reduced pension have been expanded, which enables you to receive retirement benefits earlier than in the past.

You can now receive an *unreduced* pension benefit when you are:

- Age 56 or older with 25 years of service, if you were born before 1955, or
- Age 57 or older with 25 years of service.

* * *

The new eligibility requirement, along with the existing eligibility requirements, are summarized in the following chart:

Early Retirement Options

Unreduced Pension Benefit
Minimums:

Age	Years of Service	Total of Age and Service
60	25	85
*	25	not applicable

* * *

If you are an active employee and are

> eligible to retire with an unreduced pension, you will receive a Pension Supplement as described on page PP-5 of *Your Benefits Program.*

Pet. App. 54a-55a (the "Updated SPD").

The First Circuit did not question the factual findings of the District Court, but instead ruled as a matter of law that the Updated SPD and other record evidence constituted "extraneous documents" barred from review under ERISA Section 502(a)(1)(B). Pet. App. 10a. Substituting its judgment for that of the District Court, the First Circuit then upheld Hancock's post-claim interpretation of the undistributed technical plan document. Pet. App. 13a-17a.

The ERISA problem is that the post-claim interpretation upheld by the First Circuit flatly contradicted Hancock's prior interpretation of the Pension Plan as announced in the so-called "extraneous documents" – including the Updated SPD – in effect at the time Petitioners accrued the Enhanced Benefit by achieving 25 years of service.[3] If Hancock had intended to impose an additional "active employment at age 50" condition for receiving the Enhanced Benefit, it was required to disclose that extra condition in the Updated SPD. *See* 29 U.S.C. 1022(b) (SPD must disclose all "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits"). Its post-

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[3]Hancock remained free to amend the Plan as concerns participants whose right to the Enhanced Benefit had not yet accrued because they had not yet achieved 25 years of service, which it did on December 10, 1997. Pet. App. 71a-73a.

claim attempt to impose a new eligibility criterion violates the Anti-Cutback Statute.[4] *See, e.g., Depenbrock v. Cigna Corp.*, 389 F.3d 78, 84 (3d Cir. 2004) (having "acquired rights" under the "Old [Pension] Plan," the plaintiff "retained his rights to accrued benefits, instead of having to settle for the more modest benefits provided under the New Plan").

The Post-Claim interpretation also violated the established rule under the Anti-Cutback Statute that participants shall be allowed to "grow into" their early retirement benefits:

> The courts of appeals that have ruled on an employee's right to "grow into" early retirement benefits have . . . uniformly held that as long as an employee satisfies, or will be able to satisfy, the eligibility requirements of the early retirement benefit in effect prior to the amendment, § 204(g) protects the benefit.

Ahng v. Allsteel, Inc., 96 F.3d 1033, 1036 (7th Cir. 1996). *Accord Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1145 (3d Cir. 1993), *cert. denied*, 511 U.S. 1004 (1994) ("an employer must provide funding for early

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[4]It makes no difference that Hancock's cut-back in this case is under the guise of a post-claim interpretation of the Pension Plan, rather than by formal amendment to the Plan. *Cf. Helwig v. Kelsey Hayes*, 93 F.3d 243, 250 (6th Cir. 1996) (where the SPD unambiguously promised that certain health benefits "would vest in the employees when they retired," the employer "may not now shirk the responsibilities it created by retroactively reinterpreting complex legal documents in a manner adverse to its retirees").

retirement benefits if there is the possibility that its employees will 'grow into' these benefits at a date after its early retirement plan is eliminated").

Where (as here) early retirement benefits based upon service time have accrued but are not payable until the participant reaches a specified chronological age, the participant must be allowed to reach that age without losing the benefit. *See* Gianotti, *Comment: ERISA's Anticutback Rule and Contingent Early Retirement Benefits*, 68 U. Chi. L. Rev. 1341, 1346 (2001).

B. Participants Who Have Been Denied Pension Benefits That Have Accrued Under The Plain Terms Of The Applicable Summary Plan Descriptions (SPDs) Should Not Have To Also Prove Detrimental Reliance On Those SPDs In Order To Recover The Withheld Benefits.

The First Circuit has remanded this case to the District Court to address Petitioners' remaining claims for breach of fiduciary duty and estoppel under ERISA, based upon the inconsistency between the technical plan document and the Updated SPD. In doing so, the First Circuit has instructed that "the issue of reliance may be relevant to" these remaining claims, but concedes that a split exists among the Circuits on this issue. Pet. App. 8a, 16a. Consistent with ERISA's basic purpose of protecting promised benefits, as well as its contract-based design for pension and benefits plans, this split should be resolved by eliminating the reliance requirement.

1. The Circuits Are Split Three Ways On The Reliance Question.

Presently, the First, Fourth, Seventh, Tenth, and Eleventh Circuits require participants to prove reliance in order to recover benefits promised by an SPD but not by the technical plan document. *See Govoni v. Bricklayers, Masons and Platerers Int'l Union*, 732 F.2d 250, 252 (1st Cir. 1984) ("Govoni must show some significant reliance upon, or possible prejudice flowing from the faulty" SPD); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141-42 (4th Cir. 1993) (same); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (same), *cert. denied*, 528 U.S. 1136 (2000); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (same); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992) (same).

However, the Third and Sixth Circuits flatly reject a reliance requirement:

> Based on our view of Congress's intent, an SPD furnishes the plan's terms to the extent that it conflicts with (and thus supersedes) the language of a formal plan document. We thus hold that, in enforcing an SPD's terms, a participant does not need to plead reliance or prejudice, since the claim for plan benefits under ERISA § 502(a)(1)(B) is contractual.

Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 380-81 (3d Cir. 2003). *Accord Edwards v. State Farm Mutual Auto Ins. Co.*, 851 F.2d 134, 137 (6th Cir.

1988) (because "Congress has promulgated clear directives prohibiting misleading [SPDs]," a requirement for reliance would "undermine the legislative command").

The Second, Fifth, Eighth and Ninth Circuits strike different middle ground positions on the issue. *See Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003) (prejudice to the participant is presumed and may only be rebutted with proof "that the deficient SPD was in effect a harmless error"); *Rhorer v. Raytheon Engineers and Constructors, Inc.*, 181 F.3d 634, 644 n.12 (5th Cir. 1999) ("This Court has never held that an ERISA claimant must prove reliance on a summary plan description in order to prevail on a claim to recover benefits"); *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991) ("Any burden of uncertainty created by careless or inaccurate drafting of the [SPD] must be placed on those who do the drafting"); *Koons v. Avenits Pharm., Inc.*, 367 F.3d 768, 775 (8th Cir. 2004) ("Reliance or prejudice ... is not required if the SPD is not 'faulty'"); *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 904 (9th Cir. 2004) (where the SPD and the technical plan document conflict, the court enforces the document that better favors the employee).

2. The Reliance Requirement Is Inconsistent With ERISA.

The First Circuit's reliance rule conflicts with ERISA, which was enacted "'to protect contractually defined benefits.'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989), *quoting Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985).

Claims to recover withheld benefits under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), are "contractual in nature." *Burstein, v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003). Because the applicable SPD "essentially serves as a summary of the contract's (*i.e.*, the plan document's) key terms," *id.*, *citing* 29 U.S.C. § 1022(a), the SPD forms an important part of the contract and detrimental reliance (or prejudice) is not relevant to its enforcement as such:

> If an SPD conflicts with a plan document, then a court should read the terms of the "contract" to include the terms of a plan document, as superseded and modified by conflicting language in the SPD. And, just as a court's enforcement of a contract generally does not require proof that the parties to the contract actually read, and therefore relied upon, the particular terms of the contract, we are persuaded that enforcement of an SPD's terms under a claim for plan benefits does not require a showing of reliance.

Id., *citing Feifer v. Prudential Ins. Co. of America*, 306 F.3d 1202, 1213 (2d Cir. 2002) ("an action under ERISA to enforce plan terms sounds in contract, and a plaintiff generally need not show equitable factors such as reliance or prejudice to enforce contractual terms").

The reliance rule thus transforms the requirement for complete and accurate SPDs, and consistent contract – based treatment of participants, into a case-by-case question mark. It violates the Anti-Cutback Statute, by allowing employers to retroactively deny accrued benefits to any participant

who is not able to hire a lawyer and persevere in proving reliance or prejudice at trial, and it conflicts with ERISA's basic purpose of protecting participants against the wrongful denial of promised pension benefits. *See* 29 U.S.C. § 1001(a).

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 02-1960, No. 03-1277, No. 03-1278

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KAREN FENTON; JEANNE RANDOLPH;
KATHLEEN WAGNER,
Plaintiffs,

EILEEN CHEEVER; ANTHONY COSTANZO;
MARY ANN DIEBOLD; ROSEMARY GIBSON;
EDITH NEIL; MARILYN NUSS; SUSAN
OIKELMUS,
Plaintiffs-Appellees/Cross Appellants,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, as the Administrator of the John Hancock
Mutual Life Insurance Company Pension Plan,
Defendant-Appellant/Cross Appellee.

March 10, 2005, Decided

COUNSEL: Robert S. Frank, Jr., with whom Michelle L. Dineen Jerrett, Choate, Hall & Stewart, and Stephen H. Goldberg, Kristin A. Shepard, Jorden Burt LLP, were on brief, for defendant-appellant/cross appellee.

Jeffrey B. Renton, with whom Robert J. Gilbert,

Gilbert & Renton LLC, was on brief, for plaintiffs-appellees/cross-appellants.

JUDGES: Before Torruella, Circuit Judge, John R. Gibson, * Senior Circuit Judge, and Lipez, Circuit Judge.

OPINION BY: JOHN R. GIBSON

OPINION: JOHN R. GIBSON, Senior Circuit Judge. The district court granted summary judgment in favor of the seven former employees in this action against their former employer, John Hancock Mutual Life Insurance Company. The complaint seeks enhanced early retirement benefits under the company's pension plan. The question at issue is whether a 1994 amendment to the plan, making early retirement with full benefits available at age 56 to those with 25 years of service, applies to former employees whose jobs ended before they retired, or only to those who are still employed when they retire. John Hancock appeals, and the former employees cross-appeal the district court's calculation of attorney's fees. We reverse and remand for further proceedings consistent with this opinion.

FACTS

John Hancock terminated the employment of the seven plaintiffs in March 1997 as a result of John Hancock's sale of part of its business to UNICARE of California, Inc. Despite their termination, the former employees remained vested participants in John Hancock's ERISA-qualified pension plan.

The company established the John Hancock Mutual Life Insurance Company Pension Plan in 1938. The Plan has been amended a number of times since it was established, and these amendments have periodically been incorporated in restatements of the Plan. The 1995 Restatement is at issue in this case; it was preceded by a 1976 Restatement. The Internal Revenue Service issued a favorable determination letter for the 1995 Restatement, meaning that the form of the Plan document complies with the Internal Revenue Code requirements for qualified plans.

The parties agree that the Plan was amended on October 11, 1994. Hancock asserts that this amendment was among those included in the Plan's 1995 Restatement, but the former employees refer to the 1995 Restatement as the "Partial Plan" and assert that it is non-integrated and therefore the 1994 amendment must be considered in addition to the 1995 Restatement. The 1994 amendment lowered from 55 to 50 the age at which a qualifying Plan participant could elect early retirement at reduced benefits. Employees who were at least 56 years old with 25 years of service became eligible for full retirement benefits. Before the amendment, employees were subject to a rule of 85, which allowed full retirement benefits to those with combined age and years of service equaling at least 85. Under the 1994 amendment, eligible participants who choose to retire between the ages of 50 and 56 have their benefits calculated using a formula that subtracts 0.4% of a participant's full retirement benefit for each month that precedes the participant's fifty-sixth birthday.

The Plan also had a special provision for participants

whose service with Hancock had been terminated other than by retirement. Such participants had to choose between a full pension at age 65, or a reduced pension beginning whenever they became eligible for early retirement (e.g., with 15 years of service, at age 50). That reduced pension would be calculated according to the 0.4%-per-month formula with a baseline of age 65.

The former employees, with one exception, fall into a narrow category of Plan participants who had accrued more than 25 years of service with John Hancock but had not reached 50 years of age at the time of their termination. n1 They claimed full retirement benefits starting at age 56, n2 believing that the liberalization of the retirement age in the 1994 amendment applied to them. John Hancock, acting in its capacity as Plan Administrator, denied these former employees full retirement benefits at age 56. Because these individuals' employment with John Hancock had been terminated before retiring, Hancock concluded that they were not eligible for those benefits. John Hancock interpreted the Plan to preclude this category of participants from obtaining full pension benefits at age 56. Instead, John Hancock deemed former employees who left the company prior to age 50 ineligible for full pension benefits until age 65 even if they had accrued 25 years of service. Under this reading of the Plan, the former employees were "early retirees" whose pensions were reduced by 0.4% for each month between the age at which they applied for retirement and age 65. Although the former employees could elect to begin receiving reduced benefits as of age 50, those benefits would be calculated using the normal retirement age of 65.

The former employees filed a three-count complaint to obtain the pension benefits described in the 1994 Plan amendment. The first count is a traditional benefits claim in which the former employees seek a declaration of their rights under the Plan pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). In the second count, the former employees allege John Hancock breached its fiduciary duty under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). The third count, which asserts relief under the federal common law theory of estoppel, is asserted only on behalf of former employee Diebold. The former employees moved for summary judgment on Count I of their amended complaint while John Hancock sought summary judgment on all three counts. The district court granted the former employees' motion, denied John Hancock's motion on Count I, declared moot John Hancock's motion on Counts II and III, and awarded attorney's fees and costs to the former employees in the amount of $ 301,324.24. John Hancock appeals the summary judgment order and the award of fees and costs, and the former employees cross-appeal the award of attorney's fees with respect to the rate at which they were calculated.

I. STANDARD OF REVIEW, BY COURT OF APPEALS, OF DISTRICT COURT'S DECISION

We begin by determining the proper standard of review. The district court's grant of summary judgment is, of course, reviewed de novo, with all inferences resolved in favor of John Hancock. See Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580, 583 (1st Cir. 1993). Summary judgment is appropriate only if there is no genuine dispute as to material facts

and the moving party is entitled to judgment as a matter of law. Id.

The ERISA statute directs the district court to confine its analysis to the terms of the plan. ERISA authorizes a participant to bring an action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). The identity of the plan is thus a material fact, and we must determine whether a genuine issue exists as to that identity.

II. IDENTIFYING THE PLAN

Underlying the dispute is a disagreement about which documents constitute the Plan. John Hancock urges that the Plan consists only of the undated version of "The John Hancock Mutual Life Insurance Company Pension Plan" which the former employees attached to their amended complaint as an exhibit. We will refer to this as "the 1995 Restatement," as John Hancock it was a true and correct copy of the Pension Plan as of January 1 of that year. John Hancock contends it is the operative Plan document, and that it alone governs the former employees' rights as asserted in Count I.

The former employees, by contrast, refer to this document as "the Partial Plan" and describe it as a mere non-integrated description of the technical terms of the Plan which must be supplemented in order to present a complete statement of the Plan's terms. The former employees do not present a competing version of an integrated Plan document. Rather, they assert that a number of items must be considered along with the

1995 Restatement. They refer to the 1994 amendment as the "cornerstone" of their claim, and state that they also "follow the path carved by the District Court" by relying on the 1991 summary plan description and its 1996 update to provide additional terms. The summary plan description is a booklet entitled, "Your Benefits Program: Reflecting Changing Needs," n3 and the 1996 update is labeled as such. The former employees find additional support for their interpretation of the Plan from documents created around the time of the 1994 Amendment, including a transcript of comments made by Stephen Brown, John Hancock's Chairman and CEO, at a company meeting on October 20, 1994, and a letter of the same date from Brown to employees.

In its recitation of undisputed facts, the district court quoted portions of the 1995 Restatement, the 1994 amendment, the 1996 update to the Plan's summary plan description, and various letters, brochures, and other documents distributed by John Hancock to its employees. Likewise, the district court considered these documents in granting summary judgment on Count I, the benefits claim, but it provided no explanation as to their relevance or admissibility.

John Hancock argues that the summary plan description must not be considered in this case unless the former employees prove reliance on or prejudice resulting from their reading of that document. The district court directed the parties to defer briefing the reliance issue until after the court ruled on Count I.

John Hancock's argument is in line with our holdings in Mauser v. Raytheon Co. Pension Plan, 239 F.3d 51 (1st Cir. 2001) and Bachelder v. Comm. Satellite Corp., 837

F.2d 519 (1st Cir. 1988), where we held that "other appropriate equitable relief" may be available under 29 U.S.C. § 1132(a)(3) if the summary plan description violates ERISA's disclosure provision, Mauser, 239 F.3d at 54-55, and the participant demonstrates reasonable or significant reliance on the summary plan description, Bachelder, 837 F.2d at 523. In Mauser, we further held that the availability of "other appropriate relief" precludes claims for breach of fiduciary duty and equitable estoppel based on alleged misrepresentations in the summary plan description. 239 F.3d at 57-58. See also Govoni v. Bricklayers, Masons & Plasterers Int'l Union, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J.) (To secure relief based on the summary plan description, the plan participant "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description."). Not all circuits have this requirement. See, e.g., Burstein v. Ret. Account Plan For Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 380-81 (3d Cir. 2003) (collecting cases and concluding: "Upon consideration of the 'reliance' issue, we now hold that a plan participant who bases a claim for plan benefits on a conflict between an SPD and plan document need neither plead nor prove reliance on the SPD.").

John Hancock further asserts that the other documents must not be considered with respect to any of the claims. The district court took the plaintiffs' approach, considering the 1995 Restatement, various summary plan descriptions, benefits statements the former employees received from John Hancock, and other unidentified documents attributed to John Hancock's CEO and its Human Resources Department.

John Hancock contends that the 1995 Restatement is the operative version of its pension benefit plan, and the former employees offer no competing version. We must identify the plan for a number of reasons. First, ERISA requires that a qualified plan be governed by written documents. The statute requires that every qualified employee benefit plan "shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). The purpose of this requirement is to ensure that participants know their rights and obligations under the plan, Wilson v. Moog Auto., Inc. Pension Plan & Trust for UAW Employees, 193 F.3d 1004, 1008 (8th Cir. 1999), and to provide some degree of certainty in the administration of benefits, Feifer v. Prudential Ins. Co. of America, 306 F.3d 1202, 1208 (2d Cir. 2002). Second, ERISA requires that the plan's administrator must act "in accordance with the documents and instruments governing the plan," 29 U.S.C. § 1104(a)(1)(D). A court cannot determine whether an administrator reasonably interpreted a plan without knowing what documents and instruments set forth the terms of the plan.

The 1995 Restatement constitutes the governing Plan document in this case. As John Hancock points out, it is the restated version of the Plan that includes all of the amendments through January 1 of that year. The 1994 amendment has been integrated into the 1995 Restatement and is not a document to be separately considered. The 1995 Restatement is a comprehensive recitation of the terms of the Plan that, standing alone, informs participants of their rights and obligations. See Pegram v. Herdrich, 530 U.S. 211, 223, 147 L. Ed. 2d 164, 120 S. Ct. 2143 (2000) ("Rules governing collection of premiums, definition of benefits, submission of

claims, and resolution of disagreements over entitlement to services are the sorts of provisions that constitute a plan."). The former employees offer no competing version of the governing Plan document and point to no ambiguous language in the 1995 Restatement. Thus, there is no genuine issue as to the identity of the plan. Our task, therefore, is to determine whether John Hancock abused its discretion in denying liberalized retirement benefits to the former employees under the terms of the 1995 Restatement. With the governing plan document identified, extraneous documents are irrelevant to our determination of the former employees' right to relief under Count I. Bellino v. Schlumberger Techs., Inc., 944 F.2d 26, 32 (1st Cir. 1991) ("Basic contract and trust principles preclude federal courts from considering extrinsic evidence where the ERISA terms in question are unambiguous."). See also Liston v. UNUM Corp. Officer Severance Plan, 330 F.3d 19, 25 (1st Cir. 2003) ("Liston's suit is for benefits that Liston says were promised to her by the plan, . . . so the central issue must always be what the plan promised to Liston and whether the plan delivered."); Harris v. Harvard Pilgrim Health Care, Inc., 208 F.3d 274, 279 (1st Cir. 2000) ("A *primary* purpose of ERISA is to ensure the integrity and primacy of written plans. . . .") (internal quotation marks omitted); Perry v. New England Bus. Svc., Inc., 347 F.3d 343, 346 & n.3 (1st Cir. 2003) (the court gives "the straightforward language in the Plan its natural meaning" and stating that extrinsic evidence -- i.e., "informal communications" -- "cannot alter the clear and unambiguous terms of the Plan"); Helfrick v. Carle Clinic Ass'n P.C., 328 F.3d 915, 917 (7th Cir.) ("Employer-prepared summaries, by contrast [to SPDs], have no footing in ERISA and could not be

enforced against the plan without disregarding the boundary between two distinct entities: the plan and the employer."), cert. denied, 540 U.S. 1073, 157 L. Ed. 2d 743, 124 S. Ct. 924 (2003).

III. STANDARD OF REVIEW FOR THE PLAN ADMINISTRATOR'S INTERPRETATION OF THE 1995 RESTATEMENT

The parties disagree on the appropriate standard of review of the plan administrator's decision to deny benefits. The district court determined that John Hancock acted in an arbitrary and capricious manner by interpreting its pension plan to deny the former employees' requests for early retirement benefits. This is the appropriate standard of review for a benefits claim under section 1132(a)(1)(B) where the plan gives the administrator discretionary authority to construe the plan. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113-15, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989). The Plan document contains a clear grant of discretionary authority to John Hancock as plan administrator, so we will review John Hancock's interpretation of its Plan under an arbitrary and capricious standard. See Bellino v. Schlumberger Techs., Inc., 944 F.2d 26, 29 (1st Cir. 1991) ("Federal courts review ERISA claims de novo, 'unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.'") (quoting Firestone Tire & Rubber Co., 489 U.S. at 115). The grant of authority is found in Section 11.1 of the 1995 Restatement, which states:

The Company shall be the named fiduciary and the administrator of the Plan for purposes of ERISA and shall have the authority to control and manage the operation and administration of the Plan. The Company shall have the power to adopt such rules and regulations as it may deem necessary or appropriate for the efficient operation and administration of the Plan . . . . The Company shall interpret the Plan and determine all questions arising under it. Any such determination by the Company shall be binding on all persons affected thereby.

Despite this language, the former employees contend that the arbitrary and capricious standard is inapplicable when, as here, a grant of discretionary authority is not found in the summary plan description. We are unpersuaded. The silence of the summary plan description on the issue of the administrator's discretion does not create a direct conflict with any particular Plan provision and therefore does not warrant de novo review. See Martin v. Blue Cross & Blue Shield of Virginia, Inc., 115 F.3d 1201, 1205 (4th Cir. 1997) ("Vesting the plan administrator with discretion in making coverage decisions simply does not conflict with the SPD's silence on the matter."); Wald v. Southwestern Bell Corp. Customcare Med. Plan, 83 F.3d 1002, 1006 (8th Cir. 1996) (rejecting argument that summary plan description must contain description of the administrator's discretion in order for arbitrary and capricious review to apply).

Contrary to the former employees' assertion, we also conclude that John Hancock does not suffer from a conflict of interest warranting less deferential review. We have recognized that the financial self-interest of a

plan administrator may warrant arbitrary and capricious review with "more bite." Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998). However, we have restricted this type of review to situations where the plan participant shows that an adverse determination was improperly motivated. Id. The former employees have made no such showing here.

Finally, there is no merit to the former employees' argument that the administrator's interpretation of Plan language is not a "discretionary function" and therefore not entitled to arbitrary and capricious review. In addition to conflicting with the actual language of the 1995 Restatement, which states that John Hancock "shall interpret the Plan," this argument is wholly inconsistent with our repeated recognition that arbitrary and capricious review applies when a plan reserves discretionary authority to its administrator. See, e.g., Kolling v. Am. Power Conversion Corp., 347 F.3d 11, 13 (1st Cir. 2003).

IV. THE BENEFITS CLAIM

We turn to the substance of the claim in Count I: the Plan entitles the former employees to receive full retirement benefits once they reach age 56 or, if they elect to retire between ages 50 and 56, benefits with a reduction calculated only from age 56. John Hancock rejects this interpretation and asserts that the Plan instead entitles each former employee to full pension benefits beginning at age 65 or reduced benefits calculated from the same age.

The 1995 Restatement, like its 1976 predecessor, is

organized by Articles. Article III, "Retirement Dates," addresses the timing of retirement from the earliest dates on which a participant may elect to retire to the mandatory retirement age. Article IV, "Amount of Pension," enumerates the amount of pension a participant is entitled to receive. Article VIII, "Benefits on Termination of Service, Death or Return to Employment," n4 describes benefits available to participants whose employment is terminated other than by retirement.

Because the former employees left John Hancock before they reached the age of 50, their service to the company was terminated "other than by retirement." Their entitlement to benefits, therefore, is determined first by section 8.1 of the Plan:

If the Service of a Participant who has completed at least five (5) Years of Service is terminated, other than by retirement, such Participant will, subject to Article V, be entitled to receive
(A) a yearly amount of Pension determined in accordance with Section 4.1 commencing on the first day of the month in which he attains age sixty-five (65), or

(B) the Pension described in (A) above subject to a reduction as described in Section 4.3, commencing on the first day of any month on or after the month in which he meets any of the requirements for Early Retirement described in Section 3.2.
Thus, the former employees were not entitled to receive full pensions until they reached the age of 65. The amount of such full pension would be determined by looking to Section 4.1 (contained in Article IV,

"Amount of Pension"), which lists formulas that involve years of service and final average salary. If the former employees were to choose early retirement, the amount would be determined by Section 4.3, which contains the 0.4% per month reduction, and the eligibility would be determined by Section 3.2 (contained in Article III, "Retirement Dates"), which allows early retirement at age 50 with 15 years of service.

Although the former employees rely on the 1994 amendment to the Plan, that amendment affected only Sections 3.2, 4.2, and 4.3. n5 It made no changes to Article VIII. Section 8.1 continued to direct that participants whose employment terminated other than by retirement were not eligible for full benefits before age 65. The amendment did lower the age at which the former employees could elect early reduced retirement benefits from 55 to 50, as it amended Section 3.2 which is referred to in Section 8.1. It did not change the age at which they could retire with full benefits.

John Hancock's response to the former employees' request for liberalized pension benefits was consistent with this interpretation, and it should not be disturbed.

When plaintiffs do make an argument based solely on the text of the Plan, they fail to offer a coherent or persuasive interpretation. From their scattershot offering, we extract one main contention -- that the sole criterion for determining whether a participant is entitled to a full pension at age 56 (or a reduced pension calculated from age 56) is whether she has achieved 25 years of service. So, for example, plaintiffs say that Section 8.1 applies only to participants with less than 25 years of service. On its own terms, however, Section 8.1

applies simply to a participant "who has completed at least five years of Service" and whose service is "terminated, other than by retirement;" the text says nothing about any upper limit on service, nor can such a limit be read into the test by "harmonizing" it with other sections, as plaintiffs urge. Still, plaintiffs try to argue that full pensions at age 56 must be available to any participant who has at least 25 years of service, regardless of how that service was terminated. Again, this argument avoids Section 8.1's bite only by ignoring its plain language; moreover, if there were any doubt, the section that plaintiffs invoke for this proposition (Section 4.2) states explicitly that it is "subject to any applicable Section of . . . Article . . . VIII." Plaintiffs' attempts at "harmonizing" the various sections cannot escape this conclusion. We reverse the district court order of summary judgment and remand for entry of summary judgment on Count I in favor of John Hancock.

V. CONCLUSION

Having concluded that the district court erred in granting summary judgment for the former employees on Count I, we remand. We note that the parties' briefs addressed reliance and prejudice with respect to what evidence is relevant to Count I. The district court appropriately deferred consideration of reliance until after it decided the summary judgment motions as to the first count. On remand, the issue of reliance may be relevant to the former employees' second count claiming breach of fiduciary duty under Mauser v. Raytheon Co. Pension Plan, 239 F.3d 51, 54-58 (1st Cir. 2001). Similarly, the district court will consider whether

relief is available to plaintiff Diebold in Count III. Id. at 57- 58.

Our holding makes it unnecessary to consider the former employees' cross-appeal regarding the calculation of attorney's fees. We reverse the entry of summary judgment and the award of attorney's fees and remand for further proceedings consistent with this opinion.

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

* Hon. John R. Gibson, of the Eighth Circuit, sitting by designation.

n1 One former employee, Mary Ann Diebold, had slightly less than 25 years of service at the time of her termination but would have qualified as having 25 years under a severance offer from John Hancock.

n2 Former employee Susan Oikelmus elected to begin receiving early retirement benefits at age 53 and asserted that her benefits would be calculated using a full retirement age of 56.

n3 The plaintiffs recognize this booklet as the Plan's summary plan description, but argue that it is part of the integrated Plan. The document specifically disclaims inclusion in the official Plan: "This summary describes only the highlights of your company's Pension Plan and does not attempt to cover all details. Full details are provided in the official plan text, which legally governs the operation of the plan."

n4 The title was "Benefits on Termination of Service or Death" in the 1976 version.

n5 The 1994 amendment says that it affects Sections 3.2, 4.4(A), and 4.5, but those section numbers correspond to the 1976 Restatement. In terms of the 1995 Restatement, the 1994 amendment's changes reside in Sections 3.2 (which stayed the same), 4.2, and 4.3. Old Sections 4.1 - 4.3 were collapsed into new Section 4.1, old Section 4.4 became new Section 4.2, and old Section 4.5 became new Section 4.3.

CIVIL ACTION NO. 99-11938-R GS
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EILEEN CHEEVER et al. v. JOHN HANCOCK
MUTUAL LIFE INSURANCE COMPANY

MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

June 14, 2002

STEARNS, D.J.

On September 17, 1999, ten terminated employees of defendant John Hancock Mutual Life Insurance Company (Hancock), brought this complaint against Hancock in its capacity as administrator of the John Hancock Mutual Life Insurance Company Pension Plan (Plan).1 Plaintiffs seek to clarify the amount of retirement benefits to which they are entitled under a 1994 amendment to the Plan. The complaint alleges an unlawful denial of benefits under 9 U.S.C. § 11 (a)(1)(5), a breach of fiduciary duty based on misrepresentations made both within and apart from the official Plan documents, and a claim for equitable estoppel based on Hancock's alleged oral and written misrepresentations.[2] On October 12, 2001, the parties filed cross-motions for summary judgment.Hancock seeks dismissal of all counts, while plaintiffs seek judgment on Count 1.3 On March 14, 2002, the court heard oral argument.

The undisputed facts are as follows. Plaintiffs were longtime employees of Hancock's Division of General Benefits Operations. All were vested participants in

Hancock's retirement Plan. Under the lexicon of the Plan, the plaintiffs were designated as Class B Participants.

The Plan offered Class B Participants three routes to full retirement benefits. Under § 4.1 of the Plan, read in conjunction with § 1.12, a Class B Participant with at least five years of accrued service could retire at age 50 with full benefits. Under § 4.2(B) of the Plan, a Class B Participant could retire at age 60 with full benefits if his or her age plus years of service totaled at least 85. Finally, under the terms of the 1976 version of the Plan, a participant with 40 years of accrued service could retire at any time.

There was, however, a caveat. Section 8.1 (A) of the Plan provided full benefits to a Class B Participant terminated from Hancock "other than by retirement" only if he or she had reached age 65.4 Participants affected by § 8.1 received benefits adjusted according to a formula based on the number of months that he or she fell short of the Normal Retirement Date.[5] Hancock argues that because the plaintiffs were terminated before reaching age 65, they did not "normally retire," and that § 8.1 therefore applies.

And there was an early retirement provision. Under 3.2(B) of the Plan, a Class B Participant with 15 years of service was permitted to take early retirement at age 55. His or her benefits, however, were reduced by the same § 4.3 formula that applied to § 8.1 terminees.

The 1994 Amendment

On October 11, 1994, anticipating a reduction-in-force,

Hancock amended the Plan in two significant respects. First, Hancock lowered the age at which a Class B Participant could retire with full benefits to age 56, if the participant had accrued at least 15 years of service.[6] Second, it lowered to 50 the age at which a Class B Participant with at least 15 years of accrued service could take early retirement, although again subject to the § 4.3 reduction-in-benefits formula.[7]

The 1994 Amendment stated:

1. Section 3.2, relating to Early Retirement Dates, is amended with respect to Class B Participants . . . to provide that in addition to the current early retirement provisions, that on and after the first day of the month in which a Participant attains age fifty (50) he may retire on the first day of any month prior to his Normal Retirement Date provided he has completed fifteen (15) Years of Service.

2. Section 4.4(A), relating to the amount of Early Retirement Pension Benefits, is amended with respect to Class B Participants . . . to provide that in addition to the current unreduced early retirement provisions, that such a Participant who has attained the first day of the month in the ten year period prior to his Social Security Normal Retirement Age and whose Years of Service equal at least twenty-five (25), shall be entitled to a Pension payable commencing on his Early Retirement Date in an amount equal to the sum of (a) the yearly amount of Pension which would be payable to him under Sections 4.1, 4.2 or 4.3, whichever would be applicable to him, if his Early Retirement Date were his Normal Retirement Date, but computed on the basis of his Compensation and Service prior to his

Early Retirement Date, plus (b) the temporary Pension described in Section 4.4(B), if applicable.

After the 1994 Amendment, § 4.2(B) read as follows:

(B) In the case of a Class B Participant, other than a Ford Group Office Clerical Employee, who is either an Employee or a Transferred Participant (a) who has attained the first day of the month in which his sixtieth (60th) birthday occurs and whose age in years and completed months plus his Years of Service equals at least eighty-five (85), or (b) who has attained the first day of the month in the ten-year period prior to his Social Security Normal Retirement Age and whose Years of Service equals at least twenty-five(b), the yearly amount of Pension payable commencing on his Early Retirement Date shall, subject to any applicable Sections of this Article and Articles V, VIII and IX, be equal to the sum of (1) and (2) below in the case of an Employee, and to (1) below in the case of a Transferred Participant.

(1) The yearly amount of Pension which would be payable to him under Section 4.1 if his Early Retirement Date were his Normal Retirement Date, but computed on the basis of his Compensation and Service prior to his Early Retirement Date;

(2) A temporary Pension payable;

(a)in the yearly amount of $3,000 until the first day of the month in which the Participant is first eligible for a Social Security Retirement Insurance Benefit, or would have been eligible absent his entitlement to the Social Security Disability Insurance Benefit, whether or not

the Participant makes application for such Social Security Retirement Insurance Benefit or Social Security Disability Insurance Benefit, and

(b)in the yearly amount of $1,620 from the date he is or would have been eligible, as described in (a) above, for a Social Security Retirement Insurance Benefit, until his Normal Retirement Date;

Stephen Brown, Hancock's Chief Executive Officer (CEO), convened a company-wide forum to announce, inter alia, the 1994 Amendment. At the forum, Brown told employees:

We are announcing today a liberalization to the company's pension plan, which will make it easier for longer service employees to retire, either with unreduced benefits, in some cases, or to have earlier access to reduced benefits in other cases. Specifically, while the Rule of 85 will remain intact for those over age 0, for those people between age 56 and 59, unreduced pension benefits will be available for anyone with at least 25 years of service.

In addition, any employee between ages 50 and 55 with at least 15 years of service will have access to reduced pension benefits. Now a brochure is going to be distributed this afternoon detailing all of these changes.

Following the forum, a letter from Brown, together with the promised brochure, was hand-delivered to all Plan participants. Under the legend "Reflecting Changing Needs, Your Benefits Program," Brown's letter stated:

Unreduced pension. If you have 25 or more years of service, you may retire with an unreduced pension as early as age 56. We are pleased that these new changes will give our associates more flexibility in their retirement planning and that associates with long service will receive an unreduced benefit if they retire in their late fifties.

The brochure, entitled "A Guide to the Early Retirement Options Under the Pension Plan," stated, in pertinent part:

This update describes several permanent changes to the Pension Plan that will be effective for retirements or terminations on or after January 1, 1995. . . . Although them is no need to make large scale changes to our Pension Plan, the plan has been improved to make it possible to begin receiving pension benefits sooner, in some cases as early as age 50, in order to better meet the business needs of the company and provide more flexibility to employees. There has also been an increase in the benefits available to many employees who are already eligible far early retirement with a reduced pension.... All other provisions of the plan will remain the same for 1995 including:

- The Benefit Formula;
- Vesting Provisions;
- Pre-Retirement Spouse Benefit;
- Optional Forms for the Payment of Retirement Benefits; and
- The pension Supplement for Retirees Ages 60-65.

You can receive an UNREDUCED pension benefit when you arc:

- 56 years old or more with 25 years of service (if you were born before 1955); ...
- 60 years old or more and your age and years of service added together are at least 85 (the Rule of 85); or
- 65 years old or more and you have at least 5 years of service.

The Guide directed employees to consult the 1991 Your Benefits Program booklet for additional detail. According to Hancock, the booklet, together with its annual updates, constitutes what in ERISA parlance is known as the Summary Plan Description (SPD).

In 1995, and again in 1990, the SPD was updated to reflect the 1994 Amendment. The updates contained the following chart revising the SPD

ELIGIBILITY FOR EARLY RETIREMENT - Revised 1/1/95
(See pages PP-4 through PP-6 of Your Benefit Program)

For retirements or terminations on or after January 1, 1995, the eligibility requirement for early retirement with either an unreduced or reduced pension have been expanded, which enables you to receive retirement benefits earlier than in the past.

You can now receive an unreduced pension benefits when you are:
- Age 56 or older with 25 years of service, if you were born before 1955, or
- Age 57 or older with 25 years of service.

Also, you can now receive a reduced pension benefit

when you are:
- Age 50 or older with 15 years of service.

The new eligibility requirement, along with the existing eligibility requirements, are summarized in the following chart:

Early Retirement Options

Unreduced Pension Benefit Minimums:

Age	Years of Service	Total of Age And Service
60	25	85
*	25	not applicable
50	15	not applicable
55	15	70
60	10	70

*In accordance with IRS regulations, if you were born before 1955, you can retire with are unreduced benefit at age 56; if you were born in 1955 or later, you can retire with an unreduced benefit at age 57.

If you are an active employee and are eligible to retire with an unreduced pension, you will receive a Pension Supplement as described on page PP-5 of Your Benefits Program.

In September of 1996, the plaintiffs received Personal Benefits and Compensation
Statements from Hancock notifying then that:

You are vested in your accrued benefit. Should you

leave the Company once you are vested and before you retire, you will still be eligible for a pension at your Normal Retirement Date, and earlier in some instances.

Projected Retirement Dates

You are eligible to retire:

- on your Normal Retirement Date of 12/01/2015 [i.e., age 65]
-with an unreduced benefit on 12/01/2006 [i.e., age 56] and a pension supplement until you reach your Normal Retirement Date
-with a reduced benefit on 1210112000 [i.e., age 50]

Plaintiffs' Claims

In 1997, Hancock sold the General Benefits Operations Division. At the time, all of the plaintiffs had accrued at least twenty-five years of service. With their terminations imminent, the plaintiffs, who were then forty-eight years old or younger, wrote to the Plan Administrator seeking to elect full early retirement pension benefits commencing at age 56.

On January 3, 1997, the Administrator responded with a written rejection:

The statements in your letter regarding the calculation of your pension are incorrect. Upon your termination from service with John Hancock , you will have a vested accrued benefit under the Plan. As such, you will be entitled to an unreduced pension benefit commencing upon attainment of your Normal Retirement Date, which is defined a the first day of the month in which

you reach age 65. In addition, since you have completed fifteen years of service under the Plan, you are entitled to begin receiving your pension benefit at any time upon your attaining age 50.

However, since you will have terminated your service with John Hancock prior to your 50th birthday, any pension benefit that you elect to receive prior to your Normal Retirement Date will be subject to an actuarial reduction of .4% per month, or 4.8% per year, measured from your Normal Retirement Date. Thus, contrary to the statement in your letter, you will not be entitled to an unreduced pension benefit commencing at age 56. Any benefit commencement date that you elect that is prior to age 65, whether that benefit commences before or after age 56, will result in an actuarial reduction as measured from your Normal Retirement Date.

We require that a participant give us 30 days notice of his/her intention to retire. The earliest such an election can be made is within 30 days of retirement eligibility, which in your case is age 50. At that time you may elect to retire and defer receipt of your pension to a future date, however you must elect your payment form at the time you elect to retire, and this election may not subsequently be charged.

Because you are not eligible to retire, and therefore not eligible to make a retirement election, and because of the factual inaccuracies in your letter, we will not treat your letter of January 13, 1997 as a request for the commencement of your pension benefit on July 1, 2005.

In sum, according to the Administrator's interpretation of the amended Plan, only participants who were age 56

or older and still employed by Hancock were eligible for full early retirement benefits. Since the plaintiffs were under age 56 and were facing imminent termination, they were, in the Administrator's view, ineligible for the full benefits option. This lawsuit ensued.[9]

DISCUSSION

The parties disagree whether the appropriate standard of review of the Administrator's Plan interpretation is de novo or deferential, although both contend that they are entitled to judgment whichever standard is applied. Hancock, citing Recupero v. New England Tel. And Tel. Co., 118 F. 3d 820, 827 (1st Cir. 1997), maintains that a deferential "arbitrary and capricious" standard of review is mandated by the following Plan language:

The Company shall be the named fiduciary and the administrator of the Plan far purposes of ERISA and shall have the authority to control and manage the operation and administration of the Plan. The Company shall have the power to adopt such rules and regulations as it may deem necessary and appropriate for the efficient operation and administration of the Plan.... The Company shall interpret the Plan and determine all questions arising under it. Any such determination by the Company shall be binding on all persons affected thereby.

Plan, § 11.1

The usual rule is that a clear grant of discretionary authority to a plan administrator to construe the terms of a plan will trigger an arbitrary and capricious standard of review. Recupero, 118 F. 3d at 827;

Rodriguez-Abreu v. Chase Manhattan Bank N.A., 986 F. 2d 580, 583 (1st Cir. 1998). In the face of compelling Plan language granting such authority, plaintiffs make the inventive argument that because the court, and not the Administrator, has the ultimate authority to make a binding interpretation of the Plan, the Administrator cannot be said to have the requisite unbridled discretionary authority. On closer examination, however, the plaintiffs' argument does not bear the weight that it is assigned. While the court interprets a plan, it then compares its interpretation to that of the administrator. The court will substitute its view only if the administrator's interpretation of the plan has crossed the boundary of what might plausibly be deemed reasonable. Hancock, for its part, accurately describes the court's task as requiring a determination "whether the [Administrator's] interpretation rendered any language in the plan meaningless, whether the interpretation was consistent with the plan language, and whether the provision in question has been interpreted consistently." Hancock Memorandum, at 10.[10] See Coala v. Delta Air Lines Inc., 50 F. Supp. 2d 166, 170 (D. Mass. 1999).

In the alternative, citing Gentile v. John Hancock Mut. Life Ins. Co., 951 F. Supp. 284, 290 (D. Mass. 1997), plaintiffs assert that de novo review is required because of the conflict of interest that arises from Hancock's financial stake in the Plan. While a disabling conflict might exist where a company's balance sheet could be jeopardized by its obligations to an underfunded plan, here it is undisputed that the Plan is fully funded. See Doe v. Travelers Ins. Co.,167 F. 3d 50, 57 (1st Cir. 199) (a general interest in preserving company assets does not create a conflict warranting de

novo review). cf. Doyle v. The Paul Revere Life Ins. Co.,144 F. 3d 181,184 (1st Cir.1998) (where a potential conflict of interest exists, the arbitrary and capricious standard is to be given more "bite")." Having determined that the arbitrary and capricious standard applies, I will turn first to the parties' cross-motions for summary judgment on Count I. Plaintiffs insist that because they have attained the 2 years of service required by the 1994 Amendment, they are entitled to receive unreduced benefits at age 56. Plaintiffs maintain that nothing in the amended Plan or the revised SPD states that an otherwise eligible participant must be employed by Hancock to qualify for unreduced benefits at age 56 .

The SPD and its chart summarizing the 1994 Amendment, which was distributed in 1995, and again in 1996, states that "[f]or retirements or terminations on or after January 1, 1995, the eligibility requirement for early retirement with either an unreduced or reduced pension have been expanded, which enables you to receive retirement benefits earlier than in the past." (Emphasis added.) The chart further states that "if you were born before 1955, you can retire with an unreduced benefit at age 56 ... if you have twenty five years of service." Nowhere is it said that participant roust be a current employee to qualify.[12]

The unambiguous language of the SPD is devastating to Hancock's position. Undaunted, Hancock insists that the SPD says something that it does net. "The SPD clearly explains to participants that there is a dichotomy between participants who become eligible for early retirement while actively employed with John Hancock and those who terminate from employment

prier to becoming eligible to retire from the company." Hancock Memorandum, at 14.1[13] This simply is not true. [14]

Perhaps recognizing as much, Hancock suggests that even if the language of the SPD has some significance the court should nonetheless ignore it. To do so would be an ERISA sin. ERISA requires that a:

summary plan description shall contain the following information: ... the plan's requirements respecting eligibility for participation and benefits; . . . circumstances which may result in disqualification, ineligibility, or denial or loss of benefits ....."

29 U.S.C. § 1022(b). See also 20 C.F.R. § 2520-102-2(b) ("The format of the summary plan description roust not have the effect to misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception[s], limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise rude to appear unimportant . . . ."). If Hancock intended to limit the full benefits early retirement option created by the 1994 Amendment to active employees, the SPD was required to say so. It did not.[15]

Even if the SPD did not unambiguously state that retirees end terminated employees were equally eligible for the expanded benefits offered by the 1994 Amendment (which it did), a careful reading of the 1994 Amendment confirms that this was the drafters' intent. The 1994 Amendment to the Plan declared that:

[s]ection 4.4(A), relating to the amount of Early

Retirement Pension Benefits, ... with respect to Class B Participants . . . [is amended] to provide that in addition to the current unreduced early retirement provisions, that such a Participant who has attained the first day of the month in the ten year period prior to his Social Security Normal Retirement Age [i.e., age 56] and whose Years of Service equal at least twenty-five (25), shall be entitled to a Pension payable on his Early Retirement Date in an amount equal to the sure of (a) the yearly amount of Pension which would be payable to him under Sections 4.1, 4.2 or 4.3, whichever would be applicable to hire, if his Early Retirement Date were his Normal Retirement Date, but computed on the basis of his Compensation and Service prior to his Early Retirement Date, plus (b) the temporary Pension described in Section 4.4(B), if applicable.

Under the amended language of § 4.4(A), plaintiffs were made eligible for full benefits at age 56, if they had accumulated the required 25 years of service. The only question the Amendment did not clearly answer is whether the amount of the benefits due was to be determined under § 4.1, § 4.2, or § 4.3.

Hancock argues that to answer that question, the court must look to § 8.1, which defines the benefits due to a participant "who has completed at least five (5) Years of Service [and who is] terminated, other than by retirement." Under § 8.1(A), a terminated participant who has accumulated at least five years of service is entitled to full benefits, as calculated under § 4.1, when he or she reaches age 65. Section 8.1(B) applies to terminated participants who elect the § 3.2, early retirement option subject to the § 4.3 reduction-in-benefits formula.

Hancock's argument glosses over the fact that plaintiffs have not made an election under § 3.2.[16] Plaintiffs have instead elected benefits under § 4.2. To the extent that it admits that this might be possible, Hancock argues that §4.2 applies only to "employees," which terminated participants are not. While the Plan defines are "employee" as "any person employed as a common law employee on a salaried basis," § 4.2 does not distinguish between current and former employees, unlike other sections of the Plan. See, e.g. §§ 4.3 (B)(i) and 6.1(B), respectively, which define an active employee as a "Participant who was in Service immediately prior to his Early Retirement Date" or as a "Participant who had attained his Normal Retirement Date and had not terminated service."[17]

Hancock argues that even if the term "employee]" as used in § 4. is not determinative, § 4.3 and § 8.1 require that plaintiffs nonetheless make their election under § 4.3. Section 4.3 (B)[18] states that participants who do not qualify under § 4.2(B) will receive a reduced pension benefit calculated either under subsection (i) if the participant was in service the day before his early retirement date (i.e. still employed), or under subsection (ii) "in the case of a Participant who terminates from Service prior to his Early Retirement Date." Hancock argues that the plaintiffs fall under § 4.3 (B)(ii) because they were terminated before they reached their Early Retirement Date of age 50. Section 4.3, however, by its own terms applies only if § 4.2(B) does not.

Hancock next argues that 8.1's distinction between terminated and retired participants applies to the Plan as a whole, and therefore modifies the terms of the 1994

Amendment. Nowhere in the Plan, however, is § 8.1 given such a sweeping application. In fact, the specific cross-reference in § 8.1 is to § 3.2 and not to the Plan as a whole. Moreover, if the argument is taken to its logical conclusion, it sweeps all terminated participants under § 4.3(ii), including those who qualify for benefits under § 4.2(B).[19]

Hancock maintains that even if plaintiffs' interpretation of the Plan is plausible, the arbitrary and capricious standard of review nonetheless salvages the Administrator's interpretation. A determination of reasonableness, however, as previously noted, depends on "(1) whether the interpretation renders any language in the plan `meaningless or internally inconsistent,' (2) whether the interpretation is clearly contrary to the clear language of the plan,' and (3) whether the provision at issue has been interpreted and applied consistently." Caola v. Delta Air Lines, Inc., 59 F. Supp. 2d at 170. The Administrator's interpretation fails on all three counts. It renders substantial portions of §§ 4.3(B) and 8.1 (A) superfluous and imports a definition of the term "employee" that is inconsistent with its use elsewhere in the Plan. It is further inconsistent with the reading given to the Plan by Hancock's own CEO and its Human Resources Department. Hancock nonetheless argues that while it may have spoken contradictorily, it has not acted inconsistently, because it has never allowed a claim under plaintiffs' interpretation of the Plan. This distinction between word and deed is not what Caola meant by consistency. Moreover, obstinacy in error is the soul of capriciousness.

ORDER

For the foregoing reasons, Hancock's motion for

summary judgment a to Count I is DENIED. Plaintiffs' cross-motion for summary judgment as to Court I is ALLOWED. Hancock's motion far summary judgment as to Count II and Count III is MOOT. [20]

UNITED STATES DISTRICT JUDGE

Footnotes

[1]The case was stayed to permit settlement negotiations. Three of the original plaintiffs thereafter voluntarily dismissed their claims after being reinstated by Hancock.

[2]Hancock previously argued in a motion to dismiss that plaintiffs' claims should be converted to a single claim for clarification of rights to future benefits because the plaintiffs had not reached the minimum retirement age of 50. The court mooted the motion to dismiss because all but one of the plaintiffs reached the threshold age during mediation while the remaining plaintiff has been denied all benefits.

[3]The parties have also filed four separate motions to strike affidavits and exhibits. The motions are DENIED in part. The court will only consider evidence on summary judgment that is properly supported and admissible.

[4]The full text of § 8.1 is as follows.

If the Service of a Participant who has completed at least five (5) Years of Service is terminated, other than by retirement, such Participant will, subject to Article V, be entitled to receive

(A) a yearly amount of Pension determined in accordance with Section 4.1 commencing on the first day of the month in which he attains age sixty five (65), or

(B) the Pension described in (A) above subject to a reduction as described in Section 4.3, commencing on the first day of any month on or after the month in which he meets any of the requirements for Early Retirement described in Section 3.2.

[5]The formula is set out in § 4.3. It reduces benefits by .4% for each month (or 4.8% for each year) that a terminated employee is shy of age 65.

[6]Age 56 was chosen by subtracting ten years from the Social Security full benefits retirement age, which for the plaintiffs (who were all born after December 31, 1937) was age 66.

[7] The Amendment effectively eliminated the 40 years of service retirement option.

[8]The intermediate § 4.2(A) did not apply to Class B participants.

[9]Hancock does not contest the plaintiffs' right to receive reduced benefits at age 50, regardless of their employment status.

[10]if plaintiffs' argument is taken to its logical conclusion, there could never be a review under an arbitrary and capricious standard.

[11]Plaintiffs also make the unpersuasive argument that

because Hancock never recited the discretion-triggering language in documents distributed to Plan participants, Hancock may not now rely upon it.

[12]Hancock attempts to diminish the significance of the 1995 and 1996 updates by arguing that they are only "pocket parts" supplementing the pre-existing 1991 Your Benefits Program SPD. (A lawyer will recognize the allusion, a Plan participant probably would not). This is meaningless. It is undisputed that the chart was intended to explain the 1994 Amendment to Plan participants. The documents specifically state that "[t]he new eligibility requirements along with the existing exligibility requirements, are summarized in the following chart." (Emphasis added).

[13] The tortuous path trod by Hancock in reaching this dubious conclusion can be traced as follows. Hancock argues that the chart contained in the 1995 and 199 updates was meant to be read in conjunction with the Your Benefits Program booklet. Buried deep within the booklet is text distinguishing between benefits for retirees and benefits for terminated participants. ERISA plans are typically written in tortured syntax and, as a result, participants have a duty to read their provisions carefully. But even the most sophisticated reader, on being told that the charts in the 1995 and 1996 updates were meant to illustrate both new and existing eligibility requirements for "expanded" benefits offered for "retirements or terminations on or after January 1, 1995," would not suspect that an oblique reference directing the reader to "pages PP-4 through PP-6" of the 1991 booklet was meant to limit and contradict the promises of the charts. This is particularly so given that the language Hancock relies

on in the 1991 booklet is found at page PP-10, and not at pages PP-4 through PP-6.

[14] The charts do state that to qualify for a supplementary benefit a participant must be an active employee. "If you are an active employee and are eligible to retire with an unreduced pension, you will receive a Pension Supplement as described on page PP-5 of Your Benefits Program." Plaintiffs persuasively argue that this language demonstrates that Hancock knew how to restrict benefits to active employees when it so chose.

[15]In similar fashion, Hancock attempts to put distance between itself and the individualized summaries it distributed to the plaintiffs in September of 1996, entitled "Your Personal Benefits and Compensation Statements." Hancock argues that it cannot be held responsible far its own explanation of the Plan because the "Personal Statements" do not qualify as Plan documents. This is a distressing argument that reflects badly on Hancock's dealings with its own employees.

[16] Section 3.2, it will be recalled, permits current or terminated employees with 15 years of accrued service to elect early retirement at age 50.

[17]Moreover, it is clear that the term "Employee" is used in § 4.2(B) to distinguish (and include) participants transferred into the Plan as a result of corporate acquisitions.

[18]Section 4.3(A), it will be remembered, is not applicable to Class B Participants.

[19] Hancock argues that the references to Article VIII in

§ 4.2(B) makes § 8.1(B) applicable, but as discussed above § 8.1 applies only if § 4.3 applies or if benefits are sought under § 3.2.

[20] Because the court finds that the plaintiffs are entitled to judgment under Count I, the court need not review Hancock's motion for summary judgment a to Counts II and III.

No. 02-1960, No. 03-1277, No. 03-1278

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KAREN FENTON; JEANNE RANDOLPH;
KATHLEEN WAGNER,
Plaintiffs,

EILEEN CHEEVER; ANTHONY COSTANZO;
MARY ANN DIEBOLD; ROSEMARY GIBSON;
EDITH NEIL; MARILYN NUSS; SUSAN
OIKELMUS,
Plaintiffs-Appellees/Cross Appellants,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, as the Administrator of the John Hancock
Mutual Life Insurance Company Pension Plan,
Defendant-Appellant/Cross Appellee.

Entered: April 14, 2005

ORDER OF COURT

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:

RICHARD GUSHING DONOVAN, Clerk

*Of the Eight Circuit Court of Appeals, sitting by designation.

**Judge Lynch and Judge Howard are recused and did not participate in the consideration of this matter.

29 USCS § 1022. Summary plan description

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024 (b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024 (b)(1) of this title.

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b (a)(1) of this title), whether a health insurance issuer (as defined in section 1191b (b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of

the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b (a)(1) of this title) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 USCS § 1024. Filing and furnishing of information

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:
(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022 (a) of this title—
(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or
(B) if later, within 120 days after the plan becomes subject to this part.
The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022 (a) of this title (other than a material reduction in covered services or benefits

provided in the case of a group health plan (as defined in section 1191b (a)(1) of this title)), a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan. If there is a modification or change described in section 1022 (a) of this title that is a material reduction in covered services or benefits provided under a group health plan (as defined in section 1191b (a)(1) of this title), a summary description of such modification or change shall be furnished to participants and beneficiaries not later than 60 days after the date of the adoption of the modification or change. In the alternative, the plan sponsors may provide such description at regular intervals of not more than 90 days. The Secretary shall issue regulations within 180 days after August 21, 1996, providing alternative mechanisms to delivery by mail through which group health plans (as so defined) may notify participants and beneficiaries of material reductions in covered services or benefits.

(2) The administrator shall make copies of the latest updated summary plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of

the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023 (b)(3) of this title and such other material (including the percentage determined under section 1023 (d)(11) of this title) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary,[1] plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

29 USCS § 1054. Benefit accrual requirements

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082 (c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any—

(A) tax credit employee stock ownership plan (as defined in section 409 (a) of title 26, or

(B) employee stock ownership plan (as defined in section 4975 (e)(7) of title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(4)

(A) A defined contribution plan (in this subparagraph referred to as the "transferee plan") shall not be treated as failing to meet the requirements of this subsection merely because the transferee plan does not provide some or all of the forms of distribution previously available under another defined contribution plan (in this subparagraph referred to as the "transferor plan") to the extent that—

(i) the forms of distribution previously available under the transferor plan applied to the account of a participant or beneficiary under the transferor plan that was transferred from the transferor plan to the transferee plan pursuant to a direct transfer rather than pursuant to a distribution from the transferor plan;

(ii) the terms of both the transferor plan and the transferee plan authorize the transfer described in clause (i);

(iii) the transfer described in clause (i) was made pursuant to a voluntary election by the participant or beneficiary whose account was transferred to the transferee plan;

(iv) the election described in clause (iii) was made after the participant or beneficiary received a notice describing the consequences of making the election; and

(v) the transferee plan allows the participant or beneficiary described in clause (iii) to receive any distribution to which the participant or beneficiary is entitled under the transferee plan in the form of a

single sum distribution.

(B) Subparagraph (A) shall apply to plan mergers and other transactions having the effect of a direct transfer, including consolidations of benefits attributable to different employers within a multiple employer plan.

(5) Except to the extent provided in regulations promulgated by the Secretary of the Treasury, a defined contribution plan shall not be treated as failing to meet the requirements of this subsection merely because of the elimination of a form of distribution previously available thereunder. This paragraph shall not apply to the elimination of a form of distribution with respect to any participant unless—

(A) a single sum payment is available to such participant at the same time or times as the form of distribution being eliminated; and

(B) such single sum payment is based on the same or greater portion of the participant's account as the form of distribution being eliminated.

29 USCS § 1132. Civil enforcement

(a) Persons empowered to bring a civil action A civil action may be brought—
(1) by a participant or beneficiary—
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
(3) by a participant, beneficiary, or fiduciary
(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
(B) to obtain other appropriate equitable relief
(i) to redress such violations or
(ii) to enforce any provisions of this subchapter or the terms of the plan;
(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
(5) except as otherwise provided in subsection (b) of this section, by the Secretary
(A) to enjoin any act or practice which violates any provision of this subchapter, or
(B) to obtain other appropriate equitable relief
(i) to redress such violation or
(ii) to enforce any provision of this subchapter;
(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this

section or under subsection (i) or (l) of this section;
(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169 (a)(2)(A) of this title);
(8) by the Secretary, or by an employer or other person referred to in section 1021 (f)(1) of this title,
(A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or
(B) to obtain appropriate equitable relief
(i) to redress such violation or
(ii) to enforce such subsection; or
(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(Ed. Note 1995 SPD Update)

Your Benefits Program 1995 Update

Reflecting
Changing Needs

For:

- Home Office Personnel
- Home Office Field personnel
- Subsidiary Personnel
- Managerial Clerical Personnel
- Agency Managers
- Sales Managers

Your Benefits Program
1995 Update

This 1995 update describes all changes in your benefits since the publication of *Your Benefits Program* booklet in 1991 through January 1, 1995. When combined with the booklet, this brochure provides an up-to-date description of your benefits. Please place your 1995 update in the pocket of *Your Benefits Program* booklet and discard your 1994 update.

The headings in the Contents season of this brochure correspond to sections in *Your Benefits Program* booklet, as indicated. For more information on any of these changes, call Benefit Services, T-18, at (617) 572-4404 if you are calling within the Home Office; otherwise, call 1-800-990-4404. Subsidiary personnel should call their Personnel Representative.

— The AD&D/VADD Coverages

VADD Enrollment and Effective Date
-- Revised 1/1/95
(see page A/V-3 of *Your Benefits Program*)

You may enroll when you are first hired or during the annual fall enrollment period. If you elect coverage when you are first hired, your coverage becomes effective on your date of hire. If you elect coverage during the annual fall enrollment period, your coverage becomes effective on January 1 of the following year.

The Pension Plan

(Not applicable to employees of John Hancock Freedom Securities or Cost Care)

Eligibility for Early Retirement – Revised 1/1/95
(Sec pages PP-4 through PP-6 of *Your Benefits Program*)

For retirements or terminations on or after January 1, 1995, the eligibility requirements for early retirement with either an unreduced or reduced pension have been expanded, which enables you to receive retirement benefits earlier than in the past.

You can now receive an *unreduced* pension benefit when you are:

- Age 56 or older with 25 years of service, if you were born before 1955; or

- Age 57 or older with 25 years of service.

Also, you can now receive a reduced pension benefit when you are:

- Age 50 or older with 15 years of service.

- The new eligibility requirements, along with the existing eligibility requirements, are summarized in the following chart:

Early Retirement Options

Unreduced Pension Benefit
Minimums

Age	Years of Service	Total of Age and Service
60	25	85
*	25	n/a

Reduced Pension Benefit
Minimums:

Age	Years of Service	Total of Age and Service
50	15	n/a
55	15	70
60	10	70

*In accordance with IRS regulations, if you were born before 1955. you can retire with an unreduced benefit at age 56; if you were born in 1955 or later, you can retire with an unreduced benefit at age 57.

If you are an active employee and are eligible to retire with an unreduced pension, you will receive a Pension

Supplement as described on page PP-5 of *Your Benefits Program.*

If you retire with a reduced pension, your monthly benefit will continue to be reduced by four-tenths (.4) of 1% for each month you retire before the date when you would have been eligible to receive an unreduced benefit. This results in a 4.8% early retirement reduction factor per year

Note: The IRS requires that this reduction factor be increased to 7.6% per year for "highly compensated" employees who retire between the ages of 50 and 55. However, an adjustment is made in the benefit from the nonqualified plan to offset this additional 2.8% annual reduction.

(ed. Note 1994 amendment)

John Hancock Mutual Life Insurance Company
Boston, Massachusetts
Vote of Compensation Committee
Meeting of October 11, 1994

VOTED, that the John Hancock Mutual Life Insurance Company Pension Plan, as restated by the Vote of December 8, 1975, and subsequently amended, be further amended effective January 1, 1995, subject to such regulatory approval as is necessary and to such changes of a technical nature as the Chairman of the Board or the President shall deem necessary to obtain such approval, for Class B Participants, other than Ford Group Office clerical employees, who retire from service on or after January 1, 1995, to provide as follows:

1. Section 3.2, relating to Early Retirement Dates, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that in addition to the current early retirement provisions, that on and after the first day of the month in which a Participant attains age fifty (50) he may retire on the first day of any month prior to his Normal Retirement Date provided he has completed fifteen (15) Years of Service.

2. Section 4.4 (A), relating to the amount of Early Retirement Pension Benefits, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that in addition to the current unreduced early retirement provisions, that such a Participant who has attained the first day of the month in the ten year period prior to his Social Security Normal Retirement Age and whose Years of Service equal at least twenty-five (25), shall be entitled to a-Pension payable commencing on his Early Retirement Date in an amount

equal to the sum of (a) the yearly amount of Pension which would be payable to him under Sections 4.1, 4.2 or , 4.3, whichever would be applicable to him, if his Early Retirement Date were his Normal Retirement Date, but computed on the basis of his Compensation and Service prior to his Early Retirement Date, plus (b) the temporary Pension described in Section 4.4 (B), if applicable.

3. Section 4.5, relating to Early Retirement reduction factors, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that the yearly amount of pension payable to any such Participant who is not entitled to the Pension described in Section 4.4, shall be equal to the yearly amount of Pension which would be payable to him if his Early Retirement Date were his Normal Retirement Date, reduced by an early retirement reduction factor for each month by which his. Early Retirement Date precedes the date on which he would have qualified for the Pension described in Section 4.4 [[he had continued in Service until such date, or until his Normal Retirement Date, whichever date is earlier. The early retirement reduction factor for a Participant who is a Highly Compensated Employee on his Early Retirement Date shall be 0.4% for each month during the ten year period immediately preceding his Social Security Normal Retirement Age and 0.633% for each month by which his Early Retirement Date precedes that ten year period. The early retirement reduction factor for all other Participants is 0.4% for each month.

(ed. note Brown letter)

Reflecting Changing Needs

Your Benefits Program

October 20, 1994

The John Hancock is committed to providing a competitive benefits package that meets the changing needs of our associates and at the same time meets the financial needs of the company.

Our Pension Plan is a very competitive plan when we look to our peer group of financial services companies. We also know that the pension benefit meets the accepted industry standards as to how much income you need at retirement to maintain the same standard of living.

An associate with 25 or more years of service, can expect to receive an adequate replacement of final pay here at John Hancock - between 40 and 50%. When Social Security retirement benefits are added in, the retirement income increases to about 60 - 70% at age 65. Your own personal savings - such as the TIP program - completes the financial picture. In most cases, due to changes in life style and because of lower income taxes, people need less income during retirement than they did while they were in the work force.

We are making two changes in the early retirement options under our Pension Plan to provide for more access to pension benefits. These two new rules are in addition to the rules - such as the Rule of 85 - which

currently exist.

Unreduced pension

If you have 25 or more years of service, you may retire with an unreduced pension as early as age 56 (if you were born before 1955) or 57 (if you were born in 1965 or later). We are not targeting 1955 by choice, but because the IRS regulations require that we take into account the fact that future retirees won't be starting to receive Social Security retirement benefits until age 66 or 67.

The current temporary $250 monthly supplement available at age 60, will be payable prior to age 60 for unreduced pensions.

Reduced Pension

If you are age 50 to 55 and have 15 years of service, you may retire with a reduced pension. Pension benefits will be reduced from the earliest date that you would have been eligible to receive an unreduced pension had you continued to work. The reduction factor remains at 4.8% for each year that your early retirement date precedes your earliest unreduced retirement date. For highly compensated individuals, we are required by IRS provisions to use a slightly higher reduction factor for those years of early retirement which fall in your early to mid fifties.

The changes will take effect on January 1, 1995, for retirements or terminations on and after that date, for associates who are participants in the John Hancock Pension Plan (exclusive of our two collectively

bargained employee groups). The attached booklet - A Guide to the Early Retirement Options Under the Pension Plan - describes the details of all of the early retirement options available to you, as well as providing more specific estimates as to how much of your accrued pension benefit would be available to you under the various options.

In September, you received your annual Benefits Statement with your most recent accrued pension benefit. That amount is still accurate, as it is not impacted by these changes. In most cases, the earliest date that you could retire with an unreduced or reduced pension will be sooner under the new rules. Individuals who will become newly eligible for an unreduced pension during 1995, will receive a letter within the next few days.

If you have any questions about the new plan changes, please call Carol Dempsey, Benefits Services, T-18, at (617) 572 - 6750. If you are considering retirement in the early part of 1995, and if you'cali with your choice of dates, we can provide you with current pension benefit estimates under the new rules. We are pleased that these new changes will give our associates more flexibility in their retirement planning and that associates with long service will receive an unreduced benefit if they retire in their late fifties.
Stephen L. Brown

Chairman and Chief Executive Officer

(ed. Note Early Retirement Guide)

REFLECTING CHANGING NEEDS
A GUIDE TO THE EARLY RETIREMENT OPTIONS
UNDER THE PENSION THE PLAN

Introduction

This update describes several permanent changes to the Pension Plan that will be effective for retirements or terminations on or after January 1, 1995. The company reviews the Pension Plan periodically to ensure that it is meeting both the needs of employees and. the business needs of our company. Here's what we found during the last review.

• A Competitive Plan
Based upon a comparison with other companies similar to ours, we found that our Pension Plan remains very competitive--providing pension benefits that compare favorably to those provided by other companies.

• Early Retirement Features -- Improved
Although there is no need to make large scale changes to our Pension Plan, the plan has been improved to make it possible to begin receiving pension benefits sooner, in some cases as early as age 50, in order to better meet the business needs of the company and provide more flexibility to employees. There has also been an increase in the benefits available to many employees who are already eligible for early retirement with a reduced pension.

• No Other Pension Changes

All other provisions of the plan will remain the same for 1995 including:

- The Benefit Formula;
- Vesting Provisions;
- Pre-Retirement Spouse Benefit;
- Optional Forms for the Payment of Retirement Benefits; and
- The Pension Supplement for Retirees Ages 60-65.

Need Help?

Complete details concerning the Pension Plan are contained in *Your Benefits Program* booklet. Your most recent benefits statement shows your pension benefit payable at age 65. For more information on any of that early retirement features or questions about your pension, call Benefit Services, T-18, at (617) 572-4404 or (800) 990-4404. Subsidiary personnel should call their Personnel Representative.

Important Note

This booklet describes only a few of the highlights of John Hancock's Pension Plan and is not intended to cover all details. Full details of the Pension Plan can be found in the official Plan text, which legally governs the operation of the Plan.

Eligibility

When Can You Retire?

Essentially, you can retire at any time after you have reached age 50 and you have 15 years of service. The actual pension benefit you will receive if you choose to

retire early, before age 65, will be based on your accrued pension benefit. Your pension amount will either be unreduced or reduced depending on your age and service at your retirement date. Your accrued pension benefit is the pension benefit you have earned to date under the pension formula that is payable at age 65. Here are the general guidelines for early retirement.

You can receive an UNREDUCED pension benefit when you are:

- 56 years old or more with 25 years of service (if you were born before 1955);
- 57 years old or more with 25 years of service;
- 60 years old or more and your age and years of service added together are at least 85 (the Rule of 85); or
- 65 years old or more and you have at least 5 years of service.

You can receive a REDUCED pension benefit when you are:

- 50 years old or more with 15 years of service; or
- 55 years old or more and your age and years of service added together are at least 70 (the Rule of 70); or
- 60-64 years old with more than 10 years of service.

(ed. Nate Brown Transcript)

CHEEVER v. JOHN HANCOCK MUTUAL LIFE INSURANCE
Transcript of State of the Company meeting on October 20,1994

(Steve Brown)

"Good morning everyone. Thank you, I'm Steve Brown, chairman and CEO as I think most of you know. And judging by the turnout, you all have a healthy interest in the state of the company, we appreciate that. Let me give you the short version first. John Hancock is in very good shape by many of the traditional, financial and industry measures but the trends or at least some of the trends that we are seeing are concerning. We will be talking about many steps needed to strengthen our company in the next few minutes, including both new investments and expense cuts. We have enjoyed 5 years of record statutory results and are projecting a respectable performance this year in 1994, although substantially below last year and most previous years. Our gap net income figures which tend to be a better measure of profitability are disappointing this year. And we also are falling well short of our PSI goals as well. I'm gonna ask Bill Boyan to talk about our operations results in more detail in just a few minutes. First of all I really want to step away from the business issues and address some of the concerns that I know you bring to the hall this morning. We know that there are a lot of rumors about layoffs and pension changes and so on, and we're gonna deal with them just as honestly as we can today. I do know that this is a time of great stress for everyone, and if I could reduce that stress for you today I would. That would relieve a lot of stress that the CEO is feeling as well, I assure you. So let me turn for a moment to the subject of expense cutting, which I know is on your mind. Ideally it would be nice to limit expense cutting solely to expenses which do not affect employees. And in fact we

intend to review every non-employee category of expense with an eye to trimming or eliminating expenses that are not clearly justified by the benefits being achieved. However, it's also true that the vast majority of our expenses, well in excess of 75%, are in fact employee related. So any major effort will have to focus on positions. And given our low rate of attrition, is bound to involve some layoffs. Now I honestly don't know how many people will be affected at this point. And I know for sure nobody else does either. The sectors are just in the process of analyzing their needs and developing reorganizations and re-engineering efforts. I do promise that we will let you know that we will let you know what's really going on just as soon as we have all the hard information from the sectors, as well as the sign-off on all decisions by Bill Boyars and myself. I think it is safe to assume that no significant layoffs will take place during the remainder of 1994. My guess is that we're loolang at some time early in the first quarter of 1995, for all the information to be available and for all decisions to be made. There is always a difficult balancing act involved on the one hand in making decisions quickly, versus making sure that they are the right decisions. Where it comes to peoples jobs, being careful takes on special importance Nevertheless we fully understand everyone's concerns which we share, to end the uncertainty as quickly as possible. The underlying theme of today's program is that our company is in good health, but to stay that way we are going to have to make dramatic changes and do so fairly quickly. So as you listen to Bill, bare in mind that we are not reacting to a few disappointing quarters. We believe that there are fundamental trends developing in all of our businesses which

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this slide shows that others are reducing their expenses at even a faster rate than we are. And while some other companies have bigger problems than we do, you can be sure that they're looking at themselves right now as well. And also keep in mind, that these are our insurance competitors, remember that previous slide I showed of some other

competitors, those who have going through the same cost control exercises as we are, but perhaps are starting with a much leaner cost structure. In an environment that is fiercely competitive, I think I don't have to explain to you, the company which can offer. a quality product or service at the lowest price is the one that will win the continuing loyalty of the public. Clearly, our company has a number of internal and corporate concerns. A lack of growth in our core businesses, rising, raising capital for new and necessary initiatives to compete. Potential federal tax increases and expense control and monitoring the relationship that our expenses have with revenue. We simply can't keep our expenses at their current level and expect to remain competitive in the market place. We've got to examine all of our expenses. Operating, discretionary, as well as personnel, and determine whether or not these expenses are truly necessary. We've got to find ways to run our business more efficiently. While today, I've tried to review quite a bit of information, and I suspect some of this has probably raised concerns about the, in your mind about the present strength of your company. Let me reassure that John Hancock is a very strong and financially sound company that has five very good years, but tike many of our competitors, we currently have many internal as well as external pressures on our business. And we strongly believe that we 'have' to take some hard and very pro-active measures in order to position ourselves to successfully compete in the future. And as we. move forward, and as Steve has said we're engaged in-an ongoing balancing act. On the one hand, we're vitally concerned about our expenses and our competitiveness, and on the other, we are also I assure you, we are no less concerned about you and your welfare. At the same time, we must be certain that we take every decision, and make every decision appropriately that will be in the best interest of our company and our customers, and over a long period of time. In closing, let me say that I understand how difficult this is for all of you. It's very difficult for me. I've been here for a very long time, and I know of many of you people standing

here on a personal basis. I assure you that I intend to ask that every available step be taken to minimize personnel reductions while still trying to have our company and our businesses be able to be successful in the future. I truly believe that if we can get our cost structures in fine and make significant investments and in our people, then our company is going to have an extraordinary potential for growth in the future. And now I'd like to turn it back to Steve Brown."

(Steve Brown)

"Well thank you, Bill. There you have it, our financial condition is good, but we do see a pattern of declining profitability in the years ahead, both because we have some structural weaknesses internally and because our competitive environment is becoming a lot tougher every day. We have to produce strong earnings to build capital and maintain the financial quality ratings and at the same time while investing in new products, systems and services. That's important for the company and it's important for future employment and career growth as well.The good news is that we have excellent planning systems and we do have time to make major changes in the way

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we do business across the company. Now I want you to understand that we're hardly alone in facing these challenges. The life insurance industry overall is in much the same situation and many already have made difficult cost cutting decisions. But we are not looking ahead to a cure focused solely on cutbacks, in fact as Bill outlined, we are going to be strengthening our investments in both our core and newer businesses and while we do expect net reductions in expenses, we also do expect to build our resources, both human and technological, in some areas. Each sector is now developing detailed plans. Once we've received all those plans, we'll have a better handle on total company needs.

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To manage, and I intend to do it as carefully and as compassionately as possible. One of the things we want to do is to try to be as fair as possible to.people who have given many years of service to the John Hancock. Accordingly; we are announcing today a liberalization to the company's pension plan, which will make it easier for longer service employees to retire, either with unreduced benefits, in some cases or to have earlier access to reduced benefits in other, cases. Specifically, while the rule of 85 will remain in tact for those over age 60, for those people between ages 56 and 59, unreduced pension benefits will be available for anyone with at least 25 years of service. In addition, any employee between ages 50 and 55 with at least 15 years of service will have access to reduced pension benefits. Now a new brochure is going to be distributed this afternoon, detailing all of these changes. For those of you who have specific questions about these changes, our benefits area will be available to respond to them. Let me hasten to add, that this is not a window or a soap program, these changes are being made on a permanent basis. This approach will give people with long service more choices, both during the current period of intense pressures on expenses and compliments, as well as in the future. Let me also say, as I have many times before, that there will be no soap program down the road. There is no other shoe waiting to drop and there will not be, I assure you. We will of course take many other steps to ease the burden of people affected by cutbacks similar to those that have been taken in the past. Let me talk just for a moment about rumors. I've heard a lot of rumors but the other day I heard a woman in the tower lobby declare that five thousand people were going to be laid off over the next few years. Using my actuarial training, I calculated that we would have about 50 people left to run all our businesses. Now I repeat that story because what you hear on the grapevine is rarely very accurate and a kernel of truth, there's always a kernel of truth, tends to grow exponentially into outlandish rumors. Now I can't shut off the rumor mill, because it's really too soon to come up with hard numbers.

It's not possible to be more precise because the final decision is influenced by factors that cannot be accurately forecast at this moment. For example, non-employee expenses are still being carefully reviewed with the goal of going as low as possible, without harming out various businesses. Secondly, the business units recommendations on position needs are still being analyzed, and all of them must receive top management approval. Also, some units may need to hire additional help, as we make the investments that we've been talking about. And some people who lose a job in one unit, may be transferrable to another area, and since acceptance of the pension liberalization plan, which I've just announced, is such a personal decision, we have no clear indication of how it will be accepted, what impact that will have. But I am confident, that most of you are still going to be

(ed. Note 1997 Amendment)

PROPOSED VOTE OF SENIOR COMMITTEE
Meeting of December 10, 1997

VOTED, that the John Hancock Mutuai Life Insurance Company Pension Plan, as restated by the Vote of December 21, 1994, and as subsequently amended, be further amended as follows, with Amendments I,II, and III, effective as of the effectve date of the provisions of the Plan to which those Amendments relate, to correct certain typographical and grammatical errors in the current text of the Plan; with Amendment IV, effective January 1, 1997, to reverse Amendment XI of the December 20, 1996 Vote of the Senior Committee for Salary Review amending the Plan as required by Proposed U.S. Treasury Regulation Section 1.411-(d)-4 (July 7,1997); and with Amendment V, effective January 1, 1998, to adopt changes to the Plan permitted by Section 1071 of the Taxpayer Relief Act of 1997; all of these amendments subject to such regulatory approval as is necessary and to such changes of a technical nature as the Chairman of the Board or the President shall deem necessary to obtain such approval:

I. Article I is amended by deleting "dated July 1,1993" and substituting therefor "dated July 1, 1990" in Section 1.9B.

II. Article IV is amended by inserting "who is either an Employee" after "in the case of a Class A Participant or a Ford Group Office Clerical Employee" in the introductory clause of Section 4.2 (A).

III. Article IV is further amended by deleting Section 4.4 and substituting therefor the following:

A Participant who remains in service until his Early Retirement Date can elect to defer his Pension until the first

day of any month subsequent to his Early Retirement Date which is not later than the earlier of (a) his Normal Retirement Date or (b) the first day of the month that he could have retired with an unreduced Pension under Section 4.2 assuming he continued to be Employee until such date and taking into account his age at such later date and his years of Service as of his Early Retirement Date. For the purpose of computing his Pension, the Participant's age as of the first day of the month to which his Pension payments are deferred and his actual Years of Service shall be taken into account. Such election must be in writing to the Company prior to his Early Retirement Date. No such election may be changed subsequent to the Participant's Early Retirement Date.

IV. Article VIII is amended by deleting Section 8.5 and substituting therefor the following:

8.5 Notwithstanding any provision in this Plan to the contrary, payment of a participant's benefit shall not commence later than April 1st of the calendar year following the later of (i) the calendar year in which the Participant attains age 70 1/2 or (ii) in the case of a Participant, other than a 5% owner who attained age 70 1/2 prior to January 1, 1988, the calendar year in which he retires.

V. Article VIII is further amended by deleting Section 8.6 and substituting therefor the following:

8.6 A participant who terminates service after having completed at least five (5) Years of Service shall receive a distribution of the present value of such Participant's vested yearly amount of Pension, if such Participant is not currently receiving benefits under the Plan and the present value of such Participant's vested yearly amount of Pension is $5000 or less.

For purposes of the foregoing, the interest rate used to determine present value shall be the average yield on 30-

year United States Treasury Constant Maturities published in Federal Reserve Releases G.13 and H. 15 for the second month prior to the beginning of the Plan Year for which the determination is made and the mortality assumptions shall be based on the mortality table applicable to determinations made under Code section 415(b) as provided in Section 4.6.

A participant who receives a distribution pursuant to this section, and who resumes covered employment under the plan, shall have the right to restore his yearly amount of Pension upon repayment to the Plan, within the first year following reemployment, of the full amount of the distribution plus interest, compounded annually from the date of the distribution at the rate determined for purposes of section 411(c)(2)(C) of the Code.

Supreme Court, U.S.
FILED
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(2)
No. 05-80

In The
Supreme Court of the United States

EILEEN CHEEVER; ANTHONY COSTANZO; MARY ANN DIEBOLD; ROSEMARY GIBSON, EDITH NEIL; MARILYN NUSS; SUSAN OIKELMUS,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, as the Administrator of the John Hancock Mutual Life Insurance Company Pension Plan,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

John Hancock Life Insurance Company is a wholly-owned subsidiary of John Hancock Financial Services, Inc. John Hancock Financial Services, Inc. is indirectly and privately owned by Manulife Financial Corporation whose stock is publicly traded under ticker symbol MFC in the New York and Toronto Stock Exchanges.

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STATEMENT OF THE CASE

This Petition requests review of a decision of the United States Court of Appeals for the First Circuit. 400 F.3d 83 (1st Cir. 2005). The Court of Appeals reversed a District Court decision (D. Mass.) granting summary judgment to the plaintiffs on one count of a multi-count complaint. Plaintiffs' other claims remain undecided and will be considered on remand.

A. The Context.

The petitioners seek increased pension benefits under the terms of the John Hancock Mutual Life Insurance Company Pension Plan (the "Hancock Plan"). The Hancock Plan was established in 1938, and has been amended from time to time thereafter. As is relevant to this case, the Plan was restated in 1976 (the "1976 Restatement"), amended in 1994 (the "1994 Amendment"), and restated again in 1995 (the "1995 Restatement"). John Hancock Mutual Life Insurance Company ("Hancock") is the Plan Administrator.

The plaintiffs/petitioners are seven former Hancock employees. In October, 1996, Hancock sold the business unit in which they were employed. As a result of the sale, the plaintiffs' Hancock employment ended. All of the plaintiffs were offered, and six accepted, employment by the purchaser of the business unit, in the same jobs and at the same compensation. One chose to receive severance benefits paid by Hancock.

At the time of the sale, the plaintiffs fell into a narrow category of Hancock employees. Each was between 44 and 48 years of age, and all but one had been employed by

Hancock for at least twenty-five years. None was then eligible to retire under the terms of the Hancock Plan because none had reached the minimum age for early retirement (age 50).

B. The Dispute.

The dispute that produced this case does *not* relate to the plaintiffs' entitlement to full retirement benefits, or their right to elect early retirement and thus to receive a reduced monthly benefit over a longer period of time. It relates, instead, to the age at which the plaintiffs will first be entitled to receive full pensions, and the age that should be used to calculate the benefit reduction applicable to a plaintiff who chooses early retirement.

The plaintiffs/petitioners assert that, under the terms of the Hancock Plan, they are entitled to "retire" (and to begin receiving full pension benefits) when they reach age 56. Plaintiffs also claim that in the event that they opt for early retirement – for which they are eligible upon reaching age 50 – the resulting pension reduction should be based upon the number of months between the month in which a plaintiff would reach age 56 and the month in which that plaintiff first receives early retirement benefit payments.

Hancock, in its capacity as Plan Administrator, determined that, under the terms of the Hancock Plan, the plaintiffs would be entitled (a) to retire and commence receiving full pension benefits at age 65 (not age 56), or (b) to elect early retirement and receive a reduced benefit calculated from age 65 (not age 56). This lawsuit followed.

C. Proceedings In The District Court.

The Complaint, as amended, contains three counts. Count I seeks a declaratory judgment determining plaintiffs' rights under the Hancock Plan, pursuant to Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. § 1132(a)(1)(B).[1] The Complaint (A00015-29.110) and the Amended Complaint (A00055-179) identified the 1995 Restatement of the Hancock Plan as the document that sets forth the terms of the Plan. A00015, A00017-19, A00029.43-29.90, A00058, A00060-62, A00112-59.[2] Count II alleges that Hancock, as Plan Administrator, breached its fiduciary duties to the plaintiffs. Count III asserts an equitable estoppel theory.

Under First Circuit precedent, when a plan participant claims a benefit under an ERISA plan, the court first consults the terms of the relevant plan. If the participant is entitled to the claimed benefit under the terms of the plan, the participant prevails. If the participant is not entitled to the benefit under the terms of the plan itself, the participant may nevertheless prevail in certain circumstances if (1) the Summary Plan Description ("SPD") provided pursuant to 29 U.S.C. § 1022 states that participant will receive the disputed benefit, and (2) the participant establishes she or he relied on that statement. *Govoni v. Bricklayers, Masons & Plasterers Int'l Union*

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[1] 29 U.S.C. § 1132(a)(1)(B): "A civil action may be brought . . . by a participant . . . to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

[2] Citations in the form "A___" refer to the Record Appendix in the Court of Appeals. Citations in the form "PA. ___" refer to materials in the Appendix to the Petition. The form "RA.___" refers to materials attached to this Respondent's Brief.

Pension Fund, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J); *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 522-23 (1st Cir. 1988); *Mauser v. Raytheon Co. Pension Plan*, 239 F.3d 51, 56 (1st Cir. 2001).

Shortly prior to the deadline for filing dispositive motions, the plaintiffs sought leave to designate two experts who would testify on the issue of reliance. The plaintiffs acknowledged that the District Court might conclude that the words of the Plan supported Hancock's position, but that the phrasing of the SPD favored the plaintiffs' claim. In that event, the plaintiffs conceded, the plaintiffs would be required to prove reliance on the SPD, and the proposed expert testimony would be relevant. A00260-62. Hancock opposed the motion. A00275-82.

At a hearing held shortly thereafter, the parties agreed, and the District Court ordered, that further consideration of the reliance issue be postponed until after the Court ruled on the then anticipated motions for summary judgment. Plaintiffs argued that "the plan document" and the SPD each provided the benefits that plaintiffs claimed. However, plaintiffs conceded that there might be a "conflict between the underlying plan document and the SPD." They said that the Court would only need reach the issue of reliance on the SPD if it were to conclude that the plaintiffs were not entitled to the claimed benefits under the terms of the Hancock Plan, but were led to believe that they would receive those benefits by the SPD – or, as counsel put it, if the Court could not "reconcile the summary plan description with the underlying plan document." A03022. Consideration of the reliance issue could, therefore, be postponed pending the Court's determination of plaintiffs' rights under the Plan itself. The Court noted the parties' agreement that the "efficient

thing would be to interpret the plan document, if possible, first. . . ." *Id.*

The plaintiffs then moved for summary judgment only on Count I of the Complaint – the claim for benefits provided in an ERISA plan pursuant to 29 U.S.C. § 1132 (a)(1)(B). They contended (contrary to the allegations of the Amended Complaint) that the operative "plan document" was the 1994 Amendment to the Hancock Plan. They noted that briefing of the issue of reliance on the SPD had been postponed and would be relevant only if it became necessary to reach plaintiffs' other theories of liability. A00325, A00339, A00353, A00479.

The District Court granted summary judgment for the plaintiffs. It held that the Plan Administrator's interpretation of the Hancock Plan was an abuse of discretion and that the plaintiffs were, under the terms of the Plan, entitled to the benefits that they sought. PA. 29a-36a.

D. Proceedings In The Court Of Appeals.

On appeal, Hancock argued (1) that the Hancock Plan granted the Plan Administrator discretionary authority to interpret the Plan; (2) that, under the terms of the Plan, the plaintiffs were entitled to receive full benefits beginning at age 65 or reduced benefits calculated from age 65; and (3) that the plaintiffs could not prevail based on their interpretation of the SPD without also establishing that they relied on a relevant statement in the SPD – an issue that, by agreement, had not been considered in the District Court, and was not ripe for consideration by the Court of Appeals.

In response, plaintiffs contended that they were entitled to prevail under the terms of the Hancock Plan. Those terms,

they asserted, were stated in the 1994 Amendment to the Hancock Plan which broadened eligibility for retirement at full benefits prior to age 65 for certain Hancock employees. The plaintiffs said that "[t]he cornerstone for Plaintiffs' claims is the 1994 Amendment itself, *rather than the SPDs* and other post-amendment documents created by Hancock." Appellees' Br. at 19 (emphasis supplied).[3]

Plaintiffs argued that the SPD should be used as an aid to the interpretation of the Plan itself. They asserted that their interpretation of the 1994 Amendment was "confirmed" by the language of the SPDs. Appellees' Br. at 20 and n.9 ("the District Court did not err in using the updated SPDs to inform its reading of the Plan"), p. 22 (same), p. 26 ("SPDs may and should be reviewed to aid in interpreting the meaning of the Pension Plan"). The plaintiffs did not contend that the SPD was a "plan document." They did not assert that Section 1132(a)(1)(B) authorized the recovery of benefits that are stated in an SPD, but not in an ERISA plan. They did not challenge the First Circuit's requirement that reliance be proven in order to recover a benefit stated only in an SPD. And, they did not present argument relating to reliance. Indeed, they criticized Hancock for even mentioning the subject of reliance. Appellees' Brief, p. 1 ("The issue of detrimental reliance is not part of this appeal. As Hancock concedes, the District Court directed the parties *not* to brief the

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[3] The plaintiffs attacked the Plan Administrator's interpretation because it was based on the 1995 Restatement of the Hancock Plan, which the plaintiffs characterized as a "non-integrated Plan document." Appellees' Br. at 44-48. They asserted that the 1995 Restatement should be read together with the 1994 Amendment (Appellees' Br at 48-50), and, even if read in isolation, supported plaintiffs' position. Appellees' Br. at 51-56.

reliance issue (which is relevant only to Counts II and III of the Amended Complaint), and to focus only on Count I"). (Emphasis by plaintiffs.)

The Court of Appeals upheld the Hancock Plan Administrator's decision. It observed that "ERISA authorizes a plan participant . . . to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); 400 F.3d at 87. It held that the 1995 Restatement was a "comprehensive recitation of the terms of the [Hancock] Plan," that it encompassed all amendments made prior to January 1, 1995 (including, in particular, the 1994 Plan Amendment), and that it was the document that should be construed. *Id.* at 89.

Next, the Court ruled that, under the terms of the Hancock Plan, the Plan Administrator had discretionary authority to interpret the Plan. As a result, the Administrator's interpretation could be overturned only if it were arbitrary and capricious. *Id.* at 89-90, citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

The Court of Appeals then analyzed the terms of the Plan. It concluded that the Plan Administrator's interpretation was correct, and "should not be disturbed." The Court held that there was a specific plan provision that governed the rights of plan participants, like the plaintiffs, whose service "terminated other than by retirement." They were to receive a full pension benefit beginning at age 65, or a reduced benefit calculated from age 65 if they elected early retirement. *Id.* at 91-92. The Court said that plaintiffs had identified "no ambiguous language" in the Plan (*id.* at 89), and had offered no "coherent or persuasive" alternate interpretation of the Plan. *Id.* at 92. There was, as a result, no occasion to consult extrinsic evidence to aid in the interpretation of the Plan.

The Court reversed the summary judgment granted in the District Court on Count I of the Complaint, and remanded the case for consideration of plaintiffs' other theories of recovery. It said that the District Court "appropriately deferred consideration of reliance until it decided the summary judgment motions as to the first count. On remand, the issue of reliance may be relevant to the former employees'" claims under other counts. *Id.*

ARGUMENT

In their Petition, the plaintiffs abandon the arguments that they made in the Court of Appeals and advance contentions that were either not made at all, or were made only in passing in the court below. Hancock will demonstrate, first, that the decision of the Court of Appeals is correct, of narrow scope, and wholly unworthy of further review. Hancock will then establish that the arguments now advanced by the plaintiffs (1) were neither presented to, nor addressed by, the Court of Appeals, (2) are, in any event, erroneous, and (3) in some instances, are not ripe for appellate consideration.

I. The Decision Below Was Correct And Does Not Present Any Issue That Is Worthy Of Supreme Court Review.

A. The Plan Administrator Was Given Discretionary Authority To Interpret The Hancock Plan.

This Court held in *Firestone Tire & Rubber Co.*, 489 U.S. at 113, that when an ERISA plan grants the plan administrator discretionary authority to construe the plan,

the administrator's plan interpretation should be affirmed unless it is "arbitrary and capricious." The Hancock Plan states that Hancock, as Plan Administrator "shall interpret the Plan and determine all questions arising under it. Any such determination . . . shall be binding on all persons affected thereby." RA.17-18.

Both the District Court and the Court of Appeals held that this language granted to the Administrator discretionary authority to interpret the Hancock Plan. They accurately state the rule of law established in *Firestone* and apply it to the particular language of the Hancock Plan. No broader issue was presented. No conflict among the Courts of Appeal exists. The decisions below were correct, and are not challenged in this Court.

B. The Court of Appeals' Interpretation Of The Hancock Plan Was Correct And Does Not Present An Issue That Is Appropriate For Further Review.

ERISA requires that all employee benefit plans be established and maintained pursuant to a written instrument. 29 U.S.C. § 1102(a)(1). The Amended Complaint alleges that the 1995 Plan Restatement is the relevant instrument. A00058, A00060-62, A00112-59. The Court of Appeals determined that the 1995 Restatement is the document that sets forth the terms of the Hancock Plan. 400 F.3d at 89. Its determination was correct, is not challenged in the instant Petition, is specific to the facts of this case, and will have little or no precedential effect.

1. The Plaintiffs' Rights Under The Hancock Plan.

Article III of the Hancock Plan states the dates when plan participants may, and when they must, retire. In general, plan participants must retire at age 65 (the participant's "Normal Retirement Date"). Certain participants, including the plaintiffs, may elect early retirement when they reach age 50 or on the first day of any month thereafter until they reach age 65. RA.13.

Article IV of the Plan states the amount of each participant's pension benefit. In general, benefit amounts are a function of a participant's length of service and salary in his/her last years of employment. RA.13-17.

Article VIII describes a participant's entitlement to benefits in the event that the participant's Hancock Service (his employment by Hancock or an affiliate) is "terminated other than by retirement." Section 8.1 governs the plaintiffs' claim. It states that a participant whose service is terminated other than by retirement may receive a full pension beginning at age 65 or, if the participant elects early retirement, a reduced benefit calculated in accordance with Plan Section 4.3, *viz.*:

> If the Service of a Participant who has completed at least five (5) Years of Service is terminated, other than by retirement, such Participant will . . . be entitled to receive
>
> (A) a yearly amount of Pension determined in accordance with Section 4.1 [*i.e.*, a full pension] commencing on the first day of the month in which he attains age sixty-five (65), or

> (B) the Pension described in (A) above subject to a reduction as described in Section 4.3, commencing on the first day of any month on or after the month in which he meets any of the requirements for Early Retirement described in Section 3.2 [age 50, as applied to the plaintiffs].

RA.17.

The plaintiffs' Hancock Service was "terminated other than by retirement" when the business unit in which they were employed was sold. None had then reached age 50. As a result, none were then eligible for early retirement. The plaintiffs could not, and they did not, retire from service. Therefore, each plaintiff was entitled to receive a full pension beginning at age 65.

Plan Section 4.3(B)(ii) states that if a participant opts for early retirement, the resulting pension reduction is to be calculated from age 65. It provides that "in the case of a Participant who terminated from service prior to his Early Retirement Date" – *i.e.* the plaintiffs – the Participant would receive the pension amount that "would be payable to him if his Early Retirement Date were his Normal Retirement Date [age 65]", less 0.4% per month for each month that the Participant's "Early Retirement Date precedes . . . his Normal Retirement Date." RA.16 (Section 4.3(b)); RA.12-13 (defining Early Retirement Date and Normal Retirement Date).

Finally, Section 4.2(B) of the Plan, which defines the benefits for employees who have at least twenty-five years of service, and which contains language that the plaintiffs cited in support of their benefits claim, states expressly

that rights under Section 4.2(B) are "subject to any applicable Sections of this Article [IV] and Article[] . . . VIII" – *i.e.*, are subject to Sections 8.1 and 4.3(B)(ii), quoted above. RA.13, 14.

The Court of Appeals held that the terms of the Hancock Plan were clear, that plaintiffs had identified no ambiguity in the plan language, and that the Plan Administrator's interpretation of the Plan was consistent with (indeed, was compelled by) the terms of the Plan and "should not be disturbed." 400 F.3d at 91, 92.

In this Court, the plaintiffs do not challenge this ruling. The Court of Appeals' interpretation of the Hancock Plan is manifestly inappropriate for review by this Court. It rests entirely on the interpretation of the particular words of the Hancock Plan, as applied to a small subset of Hancock Plan participants. It will have no effect on the interpretation of other ERISA plans, or even on the Hancock Plan as applied to most other Plan participants.

2. The Court of Appeals Held Correctly That The 1994 Amendment Did Not Assist The Plaintiffs.

The plaintiffs argued in the Court of Appeals that the 1994 Amendment to the Hancock Plan provided the benefits that they claimed. This argument was, as the Court of Appeals held, entirely without merit.

The 1994 Amendment (RA.19-20) consists of slightly more than one typed page. It is not, and does not purport to be, an ERISA plan. It does not include the statutorily required components of an ERISA plan. Compare, 29 U.S.C.

§ 1102(b). By its terms, it is an amendment to the Hancock Plan, as set forth in the 1976 Plan Restatement.

The 1976 Restatement contained a Section 8.1 that is, in all material respects, the same as Section 8.1 of the 1995 Plan Restatement. It stated that plan participants whose service was terminated other than by retirement were to receive full pensions beginning at age 65 or, if they elected early retirement, reduced pensions calculated from age 65. RA.23. The pension rights of all long-service employees were made subject to this provision. 1976 Restatement, RA.21, 22-23.

The Court of Appeals held, correctly, that the 1994 Amendment provided no support whatever for the plaintiffs' position. 400 F.3d at 91. It did not amend Article VIII (or Section 8.1) of the 1976 Plan Retirement. By its express terms, it applied only to plan participants who, unlike the plaintiffs, "retire from service." And, it did not alter the Plan provision that made the rights of long-service employees "subject to" Article VIII (and thus Section 8.1). RA.19-20.[4]

This aspect of the decision below is also plainly inappropriate for review by this Court. It turns on the interplay between the particular language of the 1994 Amendment and the 1976 Plan Restatement that it amended. It establishes no legal principle of general

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[4] The 1994 Amendment lowered the age (from 55 to 50) at which certain participants could elect early retirement and broadened the class of persons who could *retire from service* at full benefits before reaching age 65. It did not apply to persons whose employment terminated before they were first eligible for early retirement, and who, therefore, could not "retire from service."

applicability. No conflict of the circuits is, or could be, asserted. It is not challenged in the Petition.

C. The Court Of Appeals Had No Occasion To, And Did Not, Construe The SPD, Which, On Plaintiffs' Interpretation, Is Ambiguous.

In the Court of Appeals, the plaintiffs argued "that SPDs may and should be reviewed to aid in interpreting the meaning of the Pension Plan." Appellees' Br. at 26. They did not assert a separate entitlement to benefits under the SPD. Having found no ambiguity in the Plan, the Court of Appeals had no occasion to consult extrinsic evidence (including the SPD) to aid in the construction of the Plan. 400 F.3d at 89, citing *Bellino v. Schlumberger Tech., Inc.*, 944 F.2d 26, 32 (1st Cir. 1991); Petition, p. 16 n.2.[5]

Moreover, while the terms of the Hancock Plan were clear, the SPD was, on plaintiffs' construction, ambiguous. The SPD was issued in 1991 (A00998-1199), and amended by update brochures issued in 1995 and 1996. A01248-70, A01271-98. At PP-10, the SPD explains the rights of participants who "leave the company before retirement." RA.26. It is undisputed that this description is consistent, in all material respects, with the Hancock Plan itself, as described above. The updates modify other parts of the SPD. They contain the language that plaintiffs quote in the Petition, and upon which they rely. *See* Petition, pp. 19-21. Thus, stating the facts in the light most favorable to the

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[5] The SPD states expressly that it is *not* "the official plan text" and that the official plan text (as distinguished from the SPD) "legally governs the operation of the plan." RA 28.

plaintiffs, the SPD is internally inconsistent. It supports Hancock's position in one location, and plaintiffs' contention in another. The plaintiffs make no attempt to reconcile (and do not ask this Court to reconcile) this alleged inconsistency.

The Court of Appeals did not construe the SPD. Instead, it remanded the case to the District Court for consideration of plaintiffs' theories of recovery that had not previously been addressed by the District Court and were not the subject of the appeal. The consideration of plaintiffs' other claims will involve a construction of, and an opportunity to prove reliance upon, the relevant language in the SPD. Those issues are not ripe for consideration by this Court.

In sum, the Court of Appeals' decision addressed the arguments made by the plaintiffs below, and it correctly rejected them. Each of the issues decided by the Court of Appeals is specific to this case, and each will have little effect on any other case. None is appropriate for further review.

II. The Theories Advanced In Petition Were Not Argued Or Decided In The Court Of Appeals, And, In Any Event, Are Erroneous.

The plaintiffs state that the question presented by their Petition is:

> "Did the First Circuit contravene the Anti-Cutback Statute (29 U.S.C. 1054(g)) and other [unidentified] provisions of ERISA by holding . . . that the District Court committed legal error by considering the plain language of the applicable

> Summary Plan Description in judicially reviewing a plan administrator's decision to deny pension benefits." Petition, p. ii.

The Petition should be denied. It seeks review of issues that were neither argued nor decided in the courts below. The supposed conflict of the circuits relates to matters that were not before the Court of Appeals (or the District Court) and are not ripe for this Court's consideration. Moreover, the arguments now made by the plaintiffs are inconsistent with the plain words of the statutes on which the plaintiffs rely.

A. The Plaintiffs' Argument That A Summary Plan Description Is A Plan Document That Is An Independent Source Of Rights Under Section 1132(a)(1)(B) Was Not Advanced Below And Does Not Present A Conflict Of The Circuits.

The only issue before the Court of Appeals was plaintiffs' claim under 29 U.S.C. § 1132(a)(1)(B). That statute allows a plan participant to recover "benefits due ... *under the terms of his plan* ... or to clarify his rights to future benefits *under the terms of the plan*." (Emphasis supplied.) It does not allow a plaintiff to recover, or to obtain a declaration of rights with respect to, benefits that are not stated in an ERISA plan.

In the Petition, the plaintiffs argue for the first time that the SPD is a "plan document" and thus a source of rights under Section 1132(a)(1)(B). In fact, ERISA distinguishes between a plan and a summary plan description. 29 U.S.C. § 1102 requires that "every employee benefit plan shall be established and maintained pursuant to a written

instrument." 29 U.S.C. § 1102(a)(1). It identifies the features that must be included in every plan instrument and those that may be included in a plan instrument. 29 U.S.C. §§ 1102(b) and (c).

As its name suggests, a Summary Plan Description is a description of the rights afforded by a plan, as stated in the plan instrument; it is not the plan itself. 29 U.S.C. § 1022(a) states that "[a] summary plan description of any employee benefit plan" – not the plan itself – "shall be furnished to participants." The SPD must "reasonably apprise . . . participants . . . of their rights and obligations under the plan." 29 U.S.C. § 1022(a). It must also describe "all plan amendments" at specified times after those amendments are made to the actual plan. 29 U.S.C. § 1024(b).

The plaintiffs did not argue in the courts below that an SPD is a "plan document" that is a source of rights under 29 U.S.C. § 1132(a)(1)(B). In the District Court, consistent with the statutory language, they distinguished between "the plan document" and the SPD. They conceded that if there were a "conflict" between the "plan document," on the one hand, and the SPD, on the other, the plaintiffs would be required to prove reliance on the SPD. *See* p. 4, *supra*.

In the Court of Appeals, the plaintiffs again distinguished between the "plan document" and the SPD. Theirs was a claim for benefits "under the terms of the [Hancock] plan," pursuant to Section 1132(a)(1)(B). They argued that SPDs were an "aid in interpreting the meaning of the Pension Plan," (Appellees' Br. at 26), and that "the District Court did not err in using the updated SPD to inform its reading of the Plan." *Id.* at p. 20. They quoted cases that

state that "SPDs constitute extrinsic evidence of the meaning of the terms of ERISA plans." *Id.* at p. 20, n. 9.[6]

Because the Court of Appeals was not asked to rule that an SPD is a "plan document," or that it was an independent source of rights under Section 1132(a)(1)(B), it did not address that issue. Instead, it concluded that, as a matter of undisputed fact, the 1995 Restatement stated the terms of the Hancock Plan, and it interpreted that document.

This Court has held repeatedly that a writ of certiorari will not be granted with respect to an argument that was not advanced, and an issue that was not decided, in the court below. *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("we do not reach this issue because it was not raised or briefed below"); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (an "argument [that was] inadequately preserved in the prior proceedings" will not be considered); *Mirce v. DeKalb County, Georgia*, 433 U.S. 25, 34 (1977) (an issue that was not "pleaded, argued nor briefed either

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[6] In the introduction to its argument in the Court of Appeals (Appellees' Br. at 16) the plaintiffs stated that their claim was "based upon the plain language of the October 11, 1994 Pension Plan Amendment, both standing alone and when construed together the Summary Plan Description and other Plan provisions." When the plaintiffs elaborated this argument they made clear that the 1994 Amendment was "the cornerstone for plaintiffs' claims rather than the SPDs . . . " and that the SPD was an "aid in interpreting the meaning" of the plan itself. Appellees' Br. at 19, 26.

Of the thirteen cases cited at pp. 12-14 of the Petition to suggest that other circuits deem SPDs to be "plan documents", only two were cited in the court below. And, one of them, *Matthews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998), is cited for the proposition that SPDs are "a presumptively reliable guide to the contents of the plan itself."

in the District Court or in the Court of Appeals" will not be considered); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). ("We do not ordinarily address for the first time in this Court an issue that the Court of Appeals has not addressed); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). There is no reason to depart from that principle in this case.

Moreover, the cases cited in the Petition do not establish that the decision below is in conflict with decisions of other Courts of Appeals with respect to the particular issue that was decided by the Court of Appeals in this case. The Fourth, Seventh, Eighth, Tenth and Eleventh Circuits, like the First Circuit, allow recovery based upon statements in an SPD if the plaintiff establishes that the plaintiff actually relied on a faulty statement in the SPD. *Aiken v. Policy Mgt. Sys. Corp.*, 13 F.3d 138, 141-42 (4th Cir. 1993); *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000); *Koons v. Aventis Pharm. Inc.*, 367 F.3d 768, 775 (8th Cir. 2004); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1598-80 (11th Cir. 1992).

The cases cited in the Petition are not in conflict with these decisions. In three of the cited cases, unlike this case, the SPD was the only document that could constitute an ERISA plan. It was not a summary description of a separate ERISA plan. *Kress v. Food Employers Labor Relations Ass'n*, 391 F.3d 563 (4th Cir. 2004); *Tolson v.*

Avondale Industries, 141 F.3d 604, 609 (5th Cir. 1998); *Neuma Inc. v. AMP Inc.*, 259 F.3d 864, 873 (9th Cir. 2001).[7] The remainder of the cases, unlike this case, were not decided under 29 U.S.C. § 1132(a)(1)(B). *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2nd Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004); *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2nd Cir. 1990); *Burstein v. Retirement Account Plan For Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365 (3rd Cir. 2003); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243 (6th Cir. 1996).

Finally, it may be that the plaintiffs make the more modest argument that the Court of Appeals erred because it failed to use the SPD as an aid to the construction of the plan instrument itself. Any such argument goes nowhere. The plaintiffs concede that the Court of Appeals left "the door open for [an] SPD to be considered *if* needed to resolve an ambiguity" in a plan. Petition, p. 16, n. 2 (emphasis supplied). However, as the Court of Appeals expressly held, that plaintiffs did not identify any ambiguity in the relevant Plan language. Consequently, there was no reason to consult sources extrinsic to the Hancock Plan to interpret that Plan.

Because the plaintiffs did not argue in the courts below, and those courts did not decide, that the SPD was a "plan document" that is an independent source of rights under Section 1132(a)(1)(B), because the plaintiffs' new argument is inconsistent with the words of the statute, and because there is, in any event, no conflict of the

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[7] *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1569 (11th Cir. 1985) cited in the Petition at p. 14 presents no conflict because the Court held that both the plan and SPD provided the claimed benefit.

circuits with respect to this issue, the Petition should be denied. The Court of Appeals' determination that the words of the Hancock Plan are unambiguous, and its consequent construction of the Plan without resort to extrinsic evidence, is a case-specific determination that is also unworthy of further review by this Court.

B. Plaintiffs' Anti-Cutback Statute Argument Was Not Pressed Below And Is Inapplicable To The Facts Of This Case.

29 U.S.C. § 1054(g) states that an "accrued benefit under an ERISA plan may not be decreased by an amendment of the plan. . . ." The statute thus prohibits the reduction of [1] an *accrued benefit* [2] *under a plan* [3] by a *plan amendment.*

The plaintiffs argue that an SPD is, as a matter of law, a "plan document," and that a plan interpretation by a plan administrator that does not afford a benefit promised in an SPD violates Section 1054(g). This argument suffers from at least five flaws, each fatal.

First, the premise for plaintiffs' argument is that, as a matter of law, an SPD is, or is a part of, an ERISA plan. As noted above, the plaintiffs made no such argument in the courts below, and it is inconsistent with ERISA, which repeatedly distinguishes between plans and SPDs. *See* pp. 16-21, *supra.*

Second, the plaintiffs did not assert a claim of right under Section 1054(g) in the courts below. The Amended Complaint does not allege a violation of Section 1054(g). The only claim that was at issue in the Court of Appeals was the plaintiffs' assertion that they are entitled to

benefits under Section 1132(a)(1)(B). Section 1054(g) is mentioned only twice in the plaintiffs' fifty-nine page appellate brief, and then only for the general proposition that a retirement benefit once granted may not be taken away. Appellees' Br. at 16, 42. As a result, the Court of Appeals had no occasion to address Section 1054(g), and its opinion does not interpret, apply, or reference that statute. Certiorari should not be granted with respect to arguments that were not pressed, and issues that were not decided, in courts below. *See* pp. 18-19, *supra*.

Third, Section 1054(g) does not apply to this case because there was no diminution of an accrued benefit under an ERISA plan. Under all versions of the Hancock Plan, participants whose Hancock service terminated other than by retirement – persons who left Hancock's employ at an age when they were not yet eligible for early retirement – were entitled to retire and receive full benefits upon reaching age 65 or to opt for a reduced early retirement benefit calculated from age 65. As the Court of Appeals held, those rights never changed.*

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* The Petition quotes *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) for the proposition that ERISA is designed to ensure that employees will not be left "empty-handed" once employers have guaranteed them certain benefits. Petition, p. 8. It omits the next following sentence in *Lockheed* in which the Court said that under ERISA, "if a worker has been promised a defined pension benefit upon retirement – *and if he has fulfilled whatever conditions are required to obtain a vested benefit* – he actually will receive it." *Lockheed*, 517 U.S. at 887 (quotation and citation omitted) (emphasis supplied). In this case, at all relevant times, it has been a condition of the benefit claimed by the plaintiffs that a participant be eligible to, and does, retire directly from Hancock Service, *i.e.*, that the participant's Hancock employment does *not* terminate "other than by retirement."

Fourth, Section 1054(g) is inapplicable to this case because it prohibits *plan amendments* that decrease benefits that have accrued under an ERISA plan. Hancock did not amend the Hancock Plan in any way that reduces a benefit to any plan participant. The plaintiffs complained below, and complain in this Court, about a Plan Administrator's *interpretation* of an existing plan. A Plan Administrator's construction of an ERISA plan is not an amendment of a plan. It is in the nature of an adjudicatory decision that is challengeable under Section 1132(a)(1)(B), and that, if erroneous, may be reversed by a court.

Fifth, the plaintiffs' argument is inconsistent with this Court's decision in *Firestone Tire & Rubber Co.*, 489 U.S. at 113-15. Even if the SPD were a "plan document," the 1995 Restatement of the Hancock Plan was also a "plan document." The Hancock Plan, as set forth in the 1995 Restatement, granted the Plan Administrator discretionary authority to construe and apply the Hancock Plan. 400 F.3d at 90. *Firestone* establishes that, in these circumstances, the Plan Administrator's interpretation is to be reviewed under an arbitrary and capricious standard. However, if a plan administrator's plan interpretation could be characterized as a "plan amendment," every denial of benefits could be argued to be a violation of Section 1054(g), and every denial of benefits would then present an issue of law subject to *de novo* review. *Firestone* notwithstanding, plan administrators' plan interpretations would never be reviewed under an arbitrary and capricious standard.

In sum, plaintiffs' argument was not pressed in, or addressed by, the Court below. Moreover, Section 1054(g) is plainly inapplicable to a dispute over a plan administrator's interpretation of a plan. A writ of certiorari should not be granted.

C. There Is No Conflict Within The First Circuit.

The petitioners argue that there is an intra-First Circuit conflict between the decision in this case and that in *Glista v. UNUM Life Ins. Co.*, 378 F.3d 113 (1st Cir. 2004).

There is no conflict between *Glista* and the present case. *Glista* addresses a claim for disability benefits. The relevant insurance policy precluded the payment of benefits resulting from "pre-existing conditions." The plaintiff had manifested symptoms of the condition that resulted in his disability before the commencement of his employment, but the condition was not accurately diagnosed until after he was first employed. Prior to the events at issue, the plan administrator established internal guidelines to be used in determining whether the pre-existing condition exclusion applied. However, the plan administrator failed to apply its own pre-established decisional criteria to the facts of plaintiff's claim.

The court analogized the internal guidelines to administrative agency regulations or guidelines implementing a statute. 378 F.3d at 122. It ruled that they should be considered when applying a plan provision of uncertain scope to the facts of an individual case. The Court declined to adopt "hard-and-fast rules." It said that the disposition of issues of this type "will vary with the facts of each case." *Id.* at 114, 123.

By contrast, in the present case, the Hancock Plan states the benefit to be provided to a well-defined, objectively determinable subclass of plan participants – those whose Hancock Service terminated other than by retirement. The language of the Plan is unambiguous. The facts

are undisputed. The plaintiffs' Hancock Service terminated other than by retirement. There were no internal guidelines or other decisional criteria comparable to those in *Glista*, and none were needed.[9] Therefore, this case is completely distinguishable from *Glista*.

In any event, the existence of an intra-circuit split, if a split were to exist, would not constitute a ground upon which a writ of certiorari is ordinarily granted. *Taylor v. United States*, 493 U.S. 906 (1989) (a conflict within a circuit does not warrant certiorari); *Davis v. United States*, 417 U.S. 333, 340 (1974). "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). Stern, Gressman, Shapiro and Geller, *Supreme Court Practice*, (8th ed. 2002), § 4.6, p. 235.

D. The Alleged Conflict Of The Circuits Relating To Reliance On A Summary Plan Description Relates To An Issue That Was Not Considered In The Courts Below And Is Not Ripe For Consideration By This Court.

The plaintiffs argue that there is a conflict of the circuits regarding the question whether reliance on an SPD must be proven when the SPD states that a benefit is available, but the benefit is not, in fact, provided by the

[9] It is also undisputed that Hancock's application of the terms of the Hancock Plan to the plaintiffs was consistent with its earlier application of the same plan provision to other similarly situated plan participants. PA. 35a.

underlying plan.[10] Whatever may be the merits of that argument, it is irrelevant to the instant Petition.

The plaintiffs did not contest, at any stage of this case, the First Circuit's requirement that reliance on a statement in an SPD be proven before a plaintiff may recover a benefit that is not actually provided in the underlying plan. As a result, the District Court's opinion does not address that issue, and the Court of Appeals merely restated settled and unchallenged First Circuit precedent. 400 F.3d at 88. Indeed, in their brief in the Court of Appeals, the plaintiffs argued that the issue of reliance was relevant only to issues that were *not* before the Court. *See* pp. 6-7, *supra*. A writ of certiorari should not be granted with respect to an issue that has not been argued, and was not decided, in the courts below. *See* p. 18-19, *supra*.

Moreover, the Petition asks the Court to determine whether the First Circuit's decision in this case contravenes the Anti-Cutback Statute, 29 U.S.C. § 1054(g). The cases that are said to create the conflict of the circuits (Petition, pp. 24-25) were not decided under the Anti-Cutback Statute.

Further, this issue may never be reached in this case. The plaintiffs assert that they will prevail in the remand

[10] The rule in the First Circuit and several other circuits is premised on the view that the ERISA plan states the benefits to which plan participants are entitled. If an SPD misdescribes the terms of the plan, a plaintiff may not recover a benefit that is not provided in the plan unless the plaintiff demonstrates that he relied on the misdescription in some way that resulted in harm to the plaintiff. This analysis was first articulated in the First Circuit by then Judge, now Justice, Breyer. *Govoni*, 732 F.2d at 252; *see also Bachelder* 837 F.2d at 522-23

proceedings, because they will prove that they relied to their detriment on the statements in the SPD that (they state) support their position. If the plaintiffs are correct, the issue as to which the asserted conflict exists will be irrelevant. If the plaintiffs fail to prove reliance, if the plaintiffs challenge the First Circuit's requirement that reliance be proved, and if the case ultimately turns on that dispute, the issue may be confronted on a developed record, and will have been addressed below. In the present context, the plaintiffs' argument presents an abstract question for consideration on an undeveloped record. It is not ripe for review by this Court. Accordingly, the Petition should be denied. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) ("we generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967) (" . . . because the Court of Appeals remanded this case, it is not yet ripe for review by this Court") (Scalia, J.)

CONCLUSION

The decision of the Court of Appeals was correct. Nothing in the Court's opinion warrants further review. For that reason, the plaintiffs have advanced arguments that were not made below, and are not now ripe for review. Their new arguments are, moreover, erroneous. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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29 U.S.C. § 1022

§ 1022. Summary plan description

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions

providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

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29 U.S.C. § 1024(b)

§ 1024. Filing and furnishing of information

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and

all modifications and changes referred to in section 1022(a)(1) of this title –

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a) of this title (other than a material reduction in covered services or benefits provided in the case of a group health plan (as defined in section 1191b(a)(1) of this title)), a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan. If there is a modification or change described in section 1022(a) of this title that is a material reduction in covered services or benefits provided under a group health plan (as defined

in section 1191b(a)(1) of this title), a summary description of such modification or change shall be furnished to participants and beneficiaries not later than 60 days after the date of the adoption of the modification or change. In the alternative, the plan sponsors may provide such description at regular intervals of not more than 90 days. The Secretary shall issue regulations within 180 days after August 21, 1996, providing alternative mechanisms to delivery by mail through which group health plans (as so defined) may notify participants and beneficiaries of material reductions in covered services or benefits.

(2) The administrator shall make copies of the latest updated summary plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material (including the percentage determined under section 1023(d)(11) of this title) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the

latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

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29 U.S.C. § 1054(g)

§ 1054. Benefit accrual requirements

* * *

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of –

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy. The Secretary of

the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any –

(A) tax credit employee stock ownership plan (as defined in section 409(a) of Title 26), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of Title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(4) (A) A defined contribution plan (in this subparagraph referred to as the "transferee plan") shall not be treated as failing to meet the requirements of this subsection merely because the transferee plan does not provide some or all of the forms of distribution previously available under another defined contribution plan (in this subparagraph referred to as the "transferor plan") to the extent that

(i) the forms of distribution previously available under the transferor plan applied to the account of a participant or beneficiary under the transferor plan that was transferred from the transferor plan

to the transferee plan pursuant to a direct transfer rather than pursuant to a distribution from the transferor plan;

(ii) the terms of both the transferor plan and the transferee plan authorize the transfer described in clause (i);

(iii) the transfer described in clause (i) was made pursuant to a voluntary election by the participant or beneficiary whose account was transferred to the transferee plan;

(iv) the election described in clause (iii) was made after the participant or beneficiary received a notice describing the consequences of making the election; and

(v) the transferee plan allows the participant or beneficiary described in clause (iii) to receive any distribution to which the participant or beneficiary is entitled under the transferee plan in the form of a single sum distribution.

(B) Subparagraph (A) shall apply to plan mergers and other transactions having the effect of a direct transfer, including consolidations of benefits attributable to different employers within a multiple employer plan.

(5) Except to the extent provided in regulations promulgated by the Secretary of the Treasury, a defined contribution plan shall not be treated as failing to meet the requirements of this subsection merely because of the elimination of a form of distribution previously available thereunder. this paragraph shall not apply to the elimination of a form of distribution with respect to any participant unless

(A) a single sum payment is available to such participant at the same time or times as the form of distribution being eliminated; and

(B) such single sum payment is based on the same or greater portion of the participant's account as the form of distribution being eliminated.

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29 U.S.C. § 1102

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall –

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide –

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

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29 U.S.C. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

[Excerpted Provisions of the
1995 Restatement of the Hancock Plan]

THE JOHN HANCOCK
MUTUAL LIFE INSURANCE COMPANY

PENSION PLAN

ARTICLE I

DEFINITIONS

1.4 "Employee" shall mean any person employed as a common law employee on a salaried basis or as a

Marketing Representative, Sales Manager or Agency Manager by

(A) the Company, or

(B) a Participating Subsidiary or Affiliated Corporation, provided that any person employed by a Foreign Subsidiary or Affiliated Corporation shall be considered an employee only if: (1) he is a citizen of the United States, and (2) the Company has entered into an agreement under section 3121(1) of the Code applicable to such Foreign Subsidiary or Affiliated Corporation.

1.5 "Participant" shall mean any Employee who becomes a Participant in the Plan in accordance with Article U and who is entitled to any benefit under the Plan. "Class A Participant" shall mean a Participant who is a Marketing Representative. "Class B Participant" shall mean a Participant other than one who is Marketing Representative, and shall, unless otherwise stated, include a Participant who is a Ford Group Office Clerical Employee.

* * *

1.10 (A) "Service" shall mean, for all purposes of the Plan, all periods of employment, whether or not such employment is continuous, as an Employee or as a salaried employee of a predecessor employer, prior to his Actual Retirement Date.

* * *

1.12 "Normal Retirement Date" for a Participant shall mean the first day of the month in which he attains age sixty-five (65), or the first day of the month following the Participant's completion of five (5) Years of Service, whichever is later.

1.13 "Early Retirement Date" for a Participant shall mean the date on which he retires in accordance with Section 3.2.

* * *

ARTICLE III

RETIREMENT DATES

3.1 Subject to the following Sections of this Article, each Participant shall retire on his Normal Retirement Date.

3.2

* * *

(B) For Class B Participants other than Ford Group Office Clerical Employees, on and after the first day of the month in which any such Participant attains age fifty (50), he may retire on the first day of any month prior to his Normal Retirement Date provided:

(1) he has completed fifteen (15) Years of Service on the first day of the month in which he attains age fifty (50); or

* * *

ARTICLE IV

AMOUNT OF PENSION

4.1 The yearly amount of the Pension payable to a Participant commencing on an Actual Retirement Date on or after his Normal Retirement Date shall, subject to any applicable Sections of this Article and Articles V, VIII and IX,

* * *

(B) in the case of a Class B Participant be equal to the sum of

(1) 1.43% times Years of Service (not to exceed thirty [30] years) times Final Average Salary not in excess of Covered Compensation,

(2) 1.80% times Years of Service (not to exceed thirty [30] years) times Final Average Salary in excess of Covered Compensation, and

(3) 1% of the sum of (1) and (2) for each Year of Service in excess of thirty [30] Years of Service.

4.2

* * *

(B) In the case of a Class B Participant, other than a Ford Group Office Clerical Employee, who is either an Employee or a Transferred Participant (a) who has attained the first day of the month in which his sixtieth (60th) birthday occurs and whose age in years and completed months plus his Years of Service equals at least eighty-five (85), or (b) who has attained the first day of the month in the ten-year period prior to his Social Security Normal Retirement Age and whose Years of Service equals as least twenty-five (25), the yearly amount of Pension payable commencing on his Early Retirement Date shall, subject to any applicable Sections of this Article and Articles V, VIII and IX, be equal to the sum of (1) and (2) below in the case of an Employee, and to (1) below in the case of a Transferred Participant.

(1) The yearly amount of Pension which would be payable to him under Section 4.1 if his Early Retirement Date were his Normal Retirement

Date, but computed on the basis of his Compensation and Service prior to his Early Retirement Date;

(2) A temporary Pension payable:

(a) in the yearly amount of $3,000 until the first day of the month in which the Participant is first eligible for a Social Security Retirement Insurance Benefit, or would have been eligible absent his entitlement to the Social Security Disability Insurance Benefit, whether or not the Participant makes application for such Social Security, Retirement Insurance Benefit or Social Security Disability Insurance Benefit, and

(b) in the yearly amount of 51,620 from the date he is or would have been eligible, as described in (a) above, for a Social Security Retirement Insurance Benefit, until his Normal Retirement Date;

provided that, if on his Early Retirement Date, such a Participant (other than a Participant who had been receiving Accident and Sickness Weekly Indemnity under the John Hancock Mutual Life Insurance Company Employee Welfare Plan, or Salary Continuance Payments, during a disability leave of absence for a period of less than six (6) months and who elects an Early Retirement Date which is not later than six (6) months after the date on which such Accident and Sickness Weekly Indemnity or such Salary Continuance payments commenced) is eligible for Social Security Disability Insurance Benefits, the amount described in (2) shall not be payable to him; and further provided that if, prior to his Normal Retirement Date, such

Participant becomes ineligible for Social Security Disability Insurance Benefits because of improved health and submits to the Company satisfactory evidence of such ineligibility, the amount described in (2) shall be payable for the period prior to his Normal Retirement Date during which he is ineligible for Social Security Disability Insurance Benefits.

4.3

* * *

(B) The yearly amount of Pension payable to a Class B Participant, other than a Ford Group Office Clerical Employee, who is not entitled to the Pension described in Section 4.2(B) shall be equal to the yearly amount of Pension which would be payable to him if his Early Retirement Date were his Normal Retirement Date reduced by an early retirement reduction factor for each month by which his Early Retirement Date precedes (i) the date on which he would have qualified for the Pension described in Section 4.2(B) if he had continued in Service until such date, or until his Normal Retirement Date, whichever date is earlier, in the case of a Participant who was in Service immediately prior to his Early Retirement Date, or (ii) his Normal Retirement Date, in the case of a Participant who terminated front Service prior to his Early Retirement Date. The early retirement reduction factor for a Participant who is a Highly Compensated Employee on his Early Retirement Date shall be 0.4% for each month during the ten-year period immediately preceding his Social Security Normal Retirement Age and 0.633% for each month by which his Early Retirement Date precedes that ten-year period. The early retirement reduction

factor for all other Participants is 0.4% for each month.

* * *

ARTICLE VIII

BENEFITS ON TERMINATION OF SERVICE, DEATH OR RETURN TO EMPLOYMENT

8.1 If the Service of a Participant who has completed at least five (5) Years of Service is terminated, other than by retirement, such Participant will, subject to Article V, be entitled to receive

(A) a yearly amount of Pension determined in accordance with Section 4.1A commencing on the first day of the month in which he attains age sixty five (65), or

(B) the Pension described in (A) above subject to a reduction as described in Section 4.3, commencing on the first day of any month on or after the month in which he meets any of the requirements for Early Retirement described in Section 3.2.

* * *

ARTICLE XI

ADMINISTRATIVE AND FIDUCIARY PROVISIONS

11.1 The Company shall be the named fiduciary and the administrator of the Plan for purposes of ERISA and shall have the authority to control and manage the operation and administration of the Plan. The Company shall have the power to adopt such rules and regulations as it may deem necessary or appropriate

for the efficient operation and administration of the Plan. Such rules and regulations shall be in writing and shall be consistent with the terms of the Plan, the group annuity contracts issued under the Plan, any trust established in accordance with Section 10.1, and the requirements of ERISA. The Company shall interpret the Plan and determine all questions arising under it. Any such determination by the Company shall be binding on all persons affected thereby.

The Company shall pay the costs of administering the Plan, including, but not limited to, the fees of the Trustee and may, in its discretion, pay any fees arising out of or incidental to particular investments held in trust under the Plan. Each Participating Subsidiary or Affiliated Corporation may be required to share in such cost as determined by the Company.

[1994 Amendment to the Hancock Plan]

John Hancock Mutual Life Insurance Company
Boston, Massachusetts

VOTE OF COMPENSATION COMMITTEE

Meeting of October 11, 1994

VOTED, that the John Hancock Mutual Life Insurance Company Pension Plan, as restated by the Vote of December 8, 1975, and subsequently amended, be further amended effective January 1, 1995, subject to such regulatory approval as is necessary and to such changes of a technical nature as the Chairman of the Board or the President shall deem necessary to obtain such approval, for Class B Participants, other than Ford Group Office clerical employees, who retire from service on or after January 1, 1995, to provide as follows:

1 Section 3.2, relating to Early Retirement Dates, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that in addition to the current early retirement provisions, that on and after the first day of the month in which a Participant attains age fifty (50) he may retire on the first day of any month prior to his Normal Retirement Date provided he has completed fifteen (15) Years of Service.

2 Section 4.4(A), relating to the amount of Early Retirement Pension Benefits, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that in addition to the current unreduced early retirement provisions, that such a Participant who has attained the first day of the month in the ten year period prior to his Social Security Normal Retirement Age and whose Years of Service equal at least twenty-five (25), shall be entitled to a Pension payable commencing on his Early Retirement Date in an amount equal to the sum of (a)

the yearly amount of Pension which would be payable to him under Sections 4.1, 4.2 or 4.3, whichever would be applicable to him, if his Early Retirement Date were his Normal Retirement Date, but computed on the basis of his Compensation and Service prior to his Early Retirement Date, plus (b) the temporary Pension described in Section 4.4(B), if applicable.

3 Section 4.5, relating to Early Retirement reduction factors, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that the yearly amount of Pension payable to any such Participant who is not entitled to the Pension described in Section 4.4, shall be equal to the yearly amount of Pension which would be payable to him if his Early Retirement Date were his Normal Retirement Date, reduced by an early retirement reduction factor for each month by which his Early Retirement Date precedes the date on which he would have qualified for the Pension described in Section 4.4 if he had continued in Service until such date, or until his Normal Retirement Date, whichever date is earlier. The early retirement reduction factor for a Participant who is a Highly Compensated Employee on his Early Retirement Date shall be 0.4% for each month during the ten year period immediately preceding his Social Security Normal Retirement Age and 0.633% for each month by which his Early Retirement Date precedes that ten year period. The early retirement reduction factor for all other Participants is 0.4% for each month.

/s/ _____
Vice President, Counsel
and Secretary

[Excerpted Provisions of the
1976 Restatement of the Hancock Plan]

PENSION PLAN

for Employees of the

JOHN HANCOCK
MUTUAL LIFE INSURANCE COMPANY

As amended through

January 1, 1976

* * *

ARTICLE IV

AMOUNT OF PENSION

* * *

4.4 In the case of a Participant who is either an Employee or a Transferred Participant (a) who has attained the first day of the month in which his sixtieth birthday occurs and whose age in years and completed months plus his Years of Service equals at least eighty-five, or (b) who is a Class B Participant and has completed forty Years of Service, the yearly amount of Pension payable commencing on his Early Retirement date shall, subject to any applicable Sections of this Article and Articles V, VIII and IX, be equal to the sum of (A) and (B) below in the case of an Employee, and to (A) below in the case of a Transferred Participant.

(A) The yearly amount of Pension which would be payable to him under Section 4.1, Section 4.2, or Section 4.3, whichever would be applicable to him, if his Early Retirement Date were his Normal Retirement Date, but computed on the basis of his Compensation and Service Prior to his Early Retirement Date;

(B) A temporary Pension payable

(1) in the yearly amount of $3,000 until the first day of the month in which the Participant is first eligible for a Social Security Retirement Insurance Benefit, or would have been eligible absent his entitlement to the Social Security Disability Insurance Benefit, whether or not the Participant makes application for such Retirement Insurance Benefit, and

(2) in the yearly amount of $1,620 from the date he is or would have been eligible, as described in (1) above, for a Social Security Retirement Insurance Benefit, until his Normal Retirement Date;

provided that, if on his Early Retirement Date a Participant (other than a Participant who had been receiving Accident and Sickness weekly indemnity under the Company's Group Insurance Plan or Salary Continuance payments during disability leave of absence for a period of less than six months and who elects an Early Retirement Date which is not later than six months after the date on which such Accident and Sickness weekly indemnity or such Salary Continuance payments commenced) is eligible for Social Security Disability Benefits, the amount described in (B) shall not be payable to him; and further provided that if, prior to his Normal Retirement Date, such Participant becomes ineligible for Social Security Disability Benefits because of improved health and submits to the Company satisfactory evidence of such ineligibility, the amount described in (B) shall be payable for the period prior to his Normal Retirement Date during which he is ineligible for Social Security Disability Benefits.

4.5 The yearly amount of Pension payable commencing on his Early Retirement Date to a Participant who is not entitled to the Pension described in Section 4.4, shall, subject to any applicable Sections of this Article

and Articles V, VIII, and IX, be equal to the yearly amount of Pension which would be – payable to him under Section 4.1, Section 4.2 or Section 4.3, whichever would be applicable to him, if his Early Retirement Date were his Normal Retirement Date, reduced by ½ of 1% for each month by which his Early Retirement Date precedes (a) the date on which he would have qualified for the Pension described in Section 4.4 if he had continued in Service until such date, or until his Normal Retirement Date, whichever date is earlier, in the case of a Participant who was in Service immediately prior to his Early Retirement Date, or (b) his Normal Retirement Date, in the case of a Participant whose Service terminated prior to his Early Retirement Date.

* * *

ARTICLE VIII

BENEFITS ON TERMINATION OF SERVICE OR DEATH

8.1 If the Service of a Participant who has completed at least ten Years of Service is terminated, other than by retirement, such Participant will, subject to Article V, be entitled to receive commencing

(A) on the first day of the month in which he attains age 65, a yearly amount of Pension determined in accordance with Sections 4.1, 4.2, or 4.3, or

(B) on the first day of any month on or after the month in which he meets any of the requirements for early retirement described in Section 3.2, the Pension described in (A) above subject to a reduction of one-half of one percent per month for each month by which the date so elected precedes the date in (A) above.

If a Participant who is receiving a Pension under the terms of this Section subsequently resume Service prior to the first day of the month in which he attains age 65, he shall not be entitled to receive any such Pension subsequent to the date his Service is resumed. Upon the termination of such Service his Pension shall be recomputed on the basis of his Service in accordance with Article IV or this Section, whichever is appropriate. No repayment shall be required of any Pension received under the terms of this Section.

[Excerpted Provisions of the
1991 Summary Plan Description]

YOUR BENEFITS PROGRAM

Reflecting Changing Needs

About "Your Benefits Program" Booklet . . .

"Your Benefits Program" booklet has been completely revised to provide you with more information about your benefits program. Benefit summaries, charts and examples have been added to make the various coverages easier to understand. We have incorporated all benefit changes through January 1, 1991.

This booklet has a new look. We are now using a "bound" version rather than a loose leaf binder. While a notebook style of booklet can be easier to update by inserting new pages, it is often difficult to know whether you have all of the right pages. Each year you will receive an update to this booklet describing all of the benefit changes that have been made since the booklet was published. You will always know that you have the most current published information.

Pockets on the front and back covers can be used to store your annual booklet update, annual benefits statement, Flex Plan confirmation notices or even blank claim forms for your future use.

As this booklet was designed to meet your needs in understanding how your benefits work, we are interested in your feedback. In the front pocket of this booklet, you will find a single-page Benefits Information Feedback form that you may use at any time to let us know about additional information that you would find useful. Later this year, you will receive a short survey on how you used your

new booklet in determining your benefit choices for the 1992 Flex Plan year.

Our stated goals for our benefits program are to provide above average benefits in comparison to our competitors, and to pay the majority of the cost for those benefits. After you read your booklet, we hope that you will agree that we are meeting these very important goals.

October 1991

* * *

PP-10

If You Leave the Company (Vesting)

If you leave the company for any reason other than retirement after you have completed four years and five months of service, you earn a guaranteed right to your pension benefit. This is known as being vested in the Pension Plan.

If you leave the company before retirement and you are vested, you will receive your full pension income when you reach your normal retirement date. If you wish, you may receive a reduced pension earlier – as soon as you would have qualified for early retirement at age 55 or later. (See "Early Retirement," "Reduced Pension Benefit Example," on page PP-6.)

If you should die after you become eligible to retire, but before you begin to receive your pension benefit, your spouse may be eligible to receive a survivor's benefit from the Pension Plan. (Please see "Survivors' Benefits Before Retirement," on page PP-9 for details.)

If you have less than four years and five months of service when you leave the company, neither you nor your spouse will receive any benefit from the Pension Plan.

Other Information

Taxes and Your Pension

Pension income is considered taxable income by the Internal Revenue Service (IRS). When you retire you can elect whether or not to have the appropriate taxes withheld directly from your pension checks.

When a Benefit Is Not Payable

You or your beneficiary will not be eligible to receive a benefit from the plan if you:

> leave the company before you have become vested (see "If You Leave the Company (Vesting)," on this page), or

> die before you become vested

If you retire and begin receiving a pension and then return to work for the company other than as a part-time employee (and are under age 70½), you will not be eligible to receive a benefit from the plan. Your pension will begin again, however, when you stop working. Special rules apply once you reach age 70½. (See "If You Work Past Age 65," page PP-4.)

Assignment of Your Benefit

Under most conditions, your plan benefit is nontransferable. It may not be sold, used as collateral for a loan, given away or otherwise assigned. Also, creditors may generally not attach, garnish or otherwise interfere with your benefit.

Special procedures apply, however, if a state domestic relations or divorce court issues a qualified domestic

relations order as defined under the Retirement Equity Act and the Internal Revenue Code, relating to your plan benefit. This order must specify who is to receive all or part of your benefit under the plan. Such a judgment must:

> relate to the provision of child support, alimony payments or marital property rights;

> be made according to a state domestic relations law; and

> contain specific information required by the Retirement Equity Act.

* * *

PP-12

For more information on the PBGC insurance protection and its limitations, ask your plan administrator or contact the PBGC. Inquiries to the PBGC should be addressed to:

Office of Communications, PBGC
2020 K Street, N.W.
Washington, D.C. 20006

The PBGC Office of Communications may also be reached by calling (202) 778-8840.

Plan Documents

This summary describes only the highlights of your company's Pension Plan and does not attempt to cover all details. Full details are provided in the official plan text, which legally governs the operation of the plan. These documents, as well as the required reports of plan operations and plan descriptions as filed with the U.S. Department of Labor, are available for review through the Director of Benefit Communications, Human Resources,

T-18, during normal working hours. Upon written request to the company, copies of any of these documents will be furnished within 30 days, at a nominal cost, to any plan participants or persons receiving plan benefits.

In the Future

John Hancock expects and intends to continue the Pension Plan indefinitely, but reserves the right to amend or terminate it at any time. Of course, no change will be made that would deprive you of a benefit you've already earned.

(1)

FILED
SEP 13 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-80

IN THE

Supreme Court of the United States

EILEEN CHEEVER; ANTHONY COSTANZO; MARY ANN DIEBOLD; ROSEMARY GIBSON; EDITH NEIL; MARILYN NUSS; SUSAN OIKELMUS,
PETITIONERS

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, as the Administrator of the John Hancock Mutual Life Insurance Company Pension Plan,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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Petitioners file this short reply brief to respond to three new issues raised in the opposition brief, two substantive and the third purely procedural.

SUMMARY

First New Substantive Argument. Hancock argues that, while the Anti-Cutback Statute prohibits formal plan amendments that have the effect of rescinding accrued pension benefits, it does **not** apply where (as here) accrued benefits are rescinded under the guise of a post-accrual reinterpretation of the plan. However, this would render nugatory the Anti-Cutback Statute.

Second New Substantive Argument. Hancock argues that the SPDs must be disregarded on judicial review, because Petitioners did not demonstrate that the underlying (i.e., undistributed) plan document was facially ambiguous. However, this would strip reviewing courts of the ability to meaningfully assess whether the plan administrator acted reasonably.

New Procedural Argument. Hancock argues that certain aspects of the Question Presented were not preserved below, and are otherwise not ripe for resolution. However, the record demonstrates that each of the challenged arguments was either made by Petitioners to the First Circuit, or raised by the First Circuit itself, both of which suffice for further review in this Court. Moreover, established law-of-the-case principles make the issues ripe for immediate resolution.

REPLY

A. ERISA's Anti-Cutback Statute Prohibits Post-Accrual Plan Reinterpretations That Have The Effect Of Rescinding Accrued Pension Benefits.

The Anti-Cutback Statute prohibits "a plan amendment which has the effect of – (A) eliminating or reducing an early retirement benefit." 29 U.S.C. 1054(g)(1)(A). In opposing certiorari, Hancock argues that the Anti-Cutback does not apply because (*inter alia*) there was no formal "plan amendment" sufficient to trigger its provisions. Opp. Br. at 23. Instead, Petitioners' early retirement benefits were rescinded under the guise of a post-accrual reinterpretation of the Plan (albeit one that conflicted with the interpretation set forth in the SPDs in effect at the time of accrual).

This form-over-substance construction would render nugatory the Anti-Cutback Statute, in conflict with *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). In *Cent. Laborers'*, the Court carefully analyzed the Anti-Cutback Statute and held that it "flatly prohibits plans from attaching new conditions to benefits that an employee has already earned," or imposing a "new condition . . . after a benefit has accrued." *Id.* at 746-47.[1] The Court based its holding, in part, on an IRS regulation providing that "the addition of . . . objective conditions with respect to a . . . protected benefit that has already accrued violates [the Anti-Cutback Statute]." *Id.* at 747, *citing* 26 CFR § 1.411(d)-4, A-7.

Hancock's reading conflicts with the foregoing, and

---

[1] Because this protection goes to the heart of ERISA, *Cent. Laborers'* rejected a proposed narrow construction of the Anti-Cutback Statute that would have had the effect of taking away or reducing the value of accrued benefits. *Id.* at 749-50.

would create a loophole so large as to swallow the Anti-Cutback Statute and seriously undermine the core purpose of ERISA to ensure that "if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he will actually receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

Outside of ERISA, new interpretations that are the equivalent of amendments are routinely treated as such. *See, e.g., NLRB v. Dennison Mfg. Co.*, 419 F.2d 1080, 1084 (1st Cir. 1969), *cert. denied*, 397 U.S. 1023 (1970) ("broad interpretation" of administrative complaint constituted an improper amendment); *Novak d/ba Pets Warehouse and Petswarehouse.Com v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 453 (E.D. N.Y. 2004) ("Plaintiff's new and novel reinterpretation of the first count is tantamount to an *ad hoc* amendment of the complaint."); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp 698, 737 (1997) ("When an agency announces a new interpretation of a regulation that effectively repudiates or substantially departs from the agency's previous interpretation of that same rule, that action is tantamount to an amendment of the rule itself ...").

While this precise issue has not been addressed in a published ERISA decision, in an on-point unpublished decision the Fourth Circuit held that a new interpretation that has the effect of amending a pension plan's early retirement provisions would violate the Anti-Cutback Statute:

> The Plan has little or no incentive to abandon its current position concerning the effect of the resolution. An **interpretation** such as Martin espouses would cause the

> Plan to be in violation of ERISA's anti-cutback provisions and would jeopardize the Plan's tax qualified status under Section 401 of the Internal Revenue Code. [Emphasis added.]

Martin v. Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund, No. 95-2413, 1996 U.S. App. LEXIS 16420 at ** 6-7 (4th Cir. July 10, 1996) (confirming entitlement to early retirement benefits based on years of service).

B. Under ERISA, Reviewing Courts May Consider The Relevant SPDs Even When The Underlying Plan Document Is Not Facially Ambiguous.

This Petition concerns judicial review of a claim for withheld pension benefits under 29 U.S.C. § 1132(a)(1)(B). Where (as here) the plan administrator had discretionary authority to interpret the plan, Section 1132(a)(1)(B) establishes "reasonableness" as the standard of review:

> In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 . . . (1989), the Supreme Court held that 'a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator . . . discretionary authority . . . to construe the terms of the plan.' . . . The court has defined the *Firestone* deferential standard as one of 'reasonableness.' [Citations.]

Wagener v. SBC Pension Benefit Plan – Non Bargained Program, 407 F.3d 395, 402 (D.C. Cir. 2005) (claim stated where alleged interpretation of plan administrator was

unreasonable).

Various factors have emerged for assessing reasonableness under Section 1132(a)(1)(B), including whether the challenged decision was "(a) as a result of reasoned and principled process (b) consistent with any prior interpretations by the plan administrator (c) reasonable in light of any external standards and (d) consistent with the purposes of the plan." *Fought v. UNUM Life Ins. Co.*, 379 F.3d 997, 1003 (10th Cir. 2004), *cert. denied*, 125 S.Ct. 1972, *quoting* Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L. REV. 1083, 1135, 1172 (2001).

To meaningfully apply these factors, the record must include the relevant SPD, which (*inter alia*) provides evidence as to whether the challenged decision is "consistent with any prior interpretations by the plan administrator." *Id.* Without the SPDs, the reviewing court would be left in the dark, without any context for fairly adjudicating the plan administrator's conduct.

In opposing certiorari, Hancock argues that the SPDs constitute "extrinsic evidence" that may only be reviewed in those rare cases where the underlying (i.e., undistributed) plan document is held to be ambiguous on its face. Opp. Br. at 14, 20.[2] In all other cases, the underlying plan document must be construed in a vacuum, without reference to the relevant SPDs.

---

[2] Hancock notes the First Circuit's finding that Petitioners failed to demonstrate an ambiguity in the underlying plan document. Op. Br. at 20. However, the record demonstrates precisely the contrary, as will be shown during merits briefing. Moreover, the District Court and First Circuit rendered precisely opposite constructions of the underlying plan document, which testifies to the ambiguity and to the need for a complete judicial review record – especially including the relevant SPDs.

However, this would render judicial review meaningless in most cases, because reviewing courts would lack a record for assessing whether the plan administrator acted reasonably.

The SPDs tether plan administrators to their past, and stop them (as occurred here) from taking back their promises with impunity. For this reason – and also because they qualify as "plan documents," *see* Pet. Br. at 10-12, – SPDs constitute neither "extrinsic evidence" (in the words or Hancock) nor "extraneous documents" (in the words of the First Circuit).

C. The Question Presented Was Properly Preserved And Is Ripe For Review.

Hancock also opposes certiorari on procedural grounds, arguing that Petitioners failed to preserve certain aspects of the Question Presented for further review in this Court. *See, e.g.*, Opp. Br. at 16 (whether SPDs are "plan documents"), 21 (whether the Anti-Cutback Statute applies), 26 (whether "reliance" issue is ripe). In making this argument, however, Hancock presents an incomplete description of the record and the governing law, as shown below.

1. The "Plan Document" Issue Was Raised By The First Circuit.

Throughout this case, Petitioners have argued that the SPDs accurately describe the Plan, that Hancock is bound by the SPDs, and that the reviewing courts should consider the SPDs – which Hancock reluctantly admits: "[Petitioners] asserted [below] . . . that their interpretation of the of the 1994 Amendment was 'confirmed' by the language of the SPDs . . . [and that] 'the SPDs may and should be reviewed to aid in interpreting the meaning of the Pension Plan.'" Opp. Br.

at 6 (quoting Petitioners). Notwithstanding, Hancock argues that the precise sub-question whether SPDs constitute "plan documents" was not adequately preserved. Opp. Br. at 16-19.

This argument may be quickly rejected, for one straightforward reason: the First Circuit itself raised the "plan document" issue by holding that SPDs are "extraneous documents." *See* App. 10a ("With the governing [underlying] plan document identified, extraneous documents [including the SPDs] are irrelevant to our determination of the former employees' right to relief under Count I.") As already briefed, this is a radical departure from the precedents of this Court and every other Circuit, *see* Pet. Br. at 12-15, and it necessitates the response that SPDs cannot be "extraneous documents" because they are "plan documents." Under the jurisprudence of this Court, the issue is thus preserved and ripe:

> Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed **or** passed upon below.' [Citation.] That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions. [Emphasis added.]

United States v. Williams, Jr., 504 U.S. 36, 41 (1992). *Accord City of Springfield v. Kibbe*, 480 U.S. 257, 266 (1997) (O'Connor, J., Dissenting, with White, C.J., and Powell, J.), *reh'g denied*, 481 U.S. 1033 ("The standard we previously have employed is that we will not review a question not pressed *or* passed on by the courts below.")

(emphasis in original).

2. Petitioners Briefed The Anti-Cutback Statute To The First Circuit.

Hancock next argues that Petitioners failed to adequately preserve its Anti-Cutback Statute argument. Opp. Br. at 22. However, Hancock admits that Petitioners repeatedly "mentioned" the Anti-Cutback statute in its opening brief before the First Circuit. *Id.* In fact, Petitioners entire argument was premised on the Anti-Cutback Statute, as demonstrated by the following first two paragraphs of the "Argument" section of Petitioners' brief in the First Circuit:

> As Participants under Hancock's ERISA-qualified Pension Plan who have achieved 25 years of service at Hancock, Plaintiffs accrued the right to receive Enhanced Benefits, including an unreduced pension commencing at age 56 – or as early as age 50 reduced from age 56 – as well as lifetime medical insurance and other benefits. This right is based upon the plain language of an October 11, 1994 Pension Plan Amendment, both standing alone and when construed together with the Summary Plan Descriptions and other Plan provisions. It is also accords with a mountain of contemporaneous evidence.
>
> Having already granted these benefits to Plaintiffs, Hancock cannot now take them away. 29 U.S.C. § 1054(g) ("The accrued benefit of a participant under a plan may not be decreased by . . . eliminating or

> reducing an early retirement benefit."); *Bellas v. CBS, Inc.*, 221 F.3d 517, 524 (3rd Cir. 2000) ("There is no question but that a standard early retirement benefit, provided exclusively upon the satisfaction of certain age and/or service requirements, is an accrued benefit that is protected by [29 U.S.C. § 1054(g)]."). The protection of accrued benefits stands at the very heart of ERISA: "Congress's chief purpose in enacting [ERISA] was to ensure that workers receive promised pension benefits upon retirement." Id, 221 F.3d at 521. *See also, e.g., Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2nd Cir. 2001) ("Congress intended that ERISA function as a comprehensive remedial statute designed to safeguard pension benefits."), *citing* 29 U.S.C. § 1001 (statement of purpose).

Appendix hereto at 73a to 74a.

In addition, Hancock fails to mention that Petitioners filed in the First Circuit a *Petition for Rehearing and Suggestion for Rehearing En Banc*, which further fleshed out the arguments in exacting detail. *See* Appendix hereto at 75a to 84a.

3. The "Reliance" Issue Is Ripe Under Law-Of-The-Case Principles.

In remanding the case to the District Court, the First Circuit instructed as follows: "On remand, the issue of reliance may be relevant to the former employees' second count claiming breach of fiduciary duty under *Mauser v. Raytheon Co. Pension Plan*, 239 F.3d 51, 54-58 (1st Cir. 2001)." App. 16a. In opposing certiorari,

Hancock argues that the reliance question is not ripe, because Petitioners could prevail by proving reliance on remand. Opp. Br. at 26-27. There are two problems with Hancock's position. First, Petitioners would be harmed by having to go to trial to prove reliance even though that may not be required under ERISA, and by then having to again endure multiple layers of appeal should they fail to satisfy the District Court. Second – and more importantly here – Petitioners are advised to have the issue addressed now under established "law-of-the-case" principles. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 52 n. 7 (1987) (the lower court "already . . . considered and resolved this issue in their earlier proceedings; if the Commonwealth were to raise it again in a new set of appeals, the courts below would similarly reject the claim under the law-of-the-case doctrine.").

CONCLUSION

For the foregoing reasons and those previously briefed, this petition should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)
Nos. 02-1960, 03-1277, 03-1278

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EILEEN CHEEVER; ANTHONY COSTANZO;
MARY ANN DIEBOLD; ROSEMARY GIBSON;
EDITH NEIL; MARILYN NUSS;
SUSAN OIKELMUS
Plaintiffs-Appellees/Cross-Appellants

KAREN FENTON; JEANNE RANDOLPH;
KATHLEEN WAGNER,
Plaintiffs,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, as the Administrator of the John Hancock
Mutual Life Insurance Company Pension Plan,
Defendant-Appellant/Cross-Appellee

On Appeal From a Judgment of the
United States District Court for the
District of Massachusetts

OPENING BRIEF OF THE PLAINTIFF-
APPELLEES EILEEN CHEEVER, ANTHONY
COSTANZO, MARY ANN DIEBOLD, ROSEMARY
GIBSON, EDITH NEIL, MARYILYN NUSS
and SUSAN OIKELMUS

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* * *

ARGUMENT

HAVING ACHIEVED 25 YEARS OF SERVICE AT HANCOCK, PLAINTIFFS ACCRUED THE RIGHT TO RECEIVE ENHANCED EARLY RETIREMENT BENEFITS UNDER THE PENSION PLAN

As Participants under Hancock's ERISA-qualified Pension Plan who have achieved 25 years of service at Hancock, Plaintiffs accrued the right to receive Enhanced Benefits, including an unreduced pension commencing at age 56 - or as early as age 50 reduced from age 56 - as well as lifetime medical insurance and other benefits. This right is based upon the plain language of an October 11, 1994 Pension Plan Amendment, both standing alone and when construed together with the Summary Plan Descriptions and other Plan provisions. It is also accords with a mountain of contemporaneous evidence.

Having already granted these benefits to Plaintiffs, Hancock cannot now take them away. 29 U.S.C. § 1054(g) ("The accrued benefit of a participant under a plan may not be decreased by ... eliminating or reducing an early retirement benefit."); Bellas v. CBS, Inc., 221

F.3d 517, 524 (3rd Cir. 2000) ("There is no question but that a standard early retirement benefit, provided exclusively upon the satisfaction of certain age and/or service requirements, is an accrued benefit that is protected by [29 U.S.C. § 1054(g)]."). The protection of accrued benefits stands at the very heart of ERISA: "Congress's chief purpose in enacting [ERISA] was to ensure that workers receive promised pension benefits upon retirement." Id., 221 F.3d at 521. See also, e.g., Layaou v. Xerox Corp., 238 F.3d 205, 210 (2nd Cir. 2001) ("Congress intended that ERISA function as a comprehensive remedial statute designed to safeguard pension benefits."), *citing* 29 U.S.C. § 1001 (statement of purpose).

Nos. 02-1960, 03-1277, 03-1278

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KATHLEEN WAGNER,
Plaintiffs,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, as the Administrator of the John Hancock
Mutual Life Insurance Company Pension Plan,
Defendant-Appellant/Cross-Appellee

On Appeal From a Judgment of the
United States District Court for the
District of Massachusetts

APPELLEES' PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

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REASONS FOR GRANTING THE PETITION

A. The Court's Decision Violates ERISA's Anti-Cutback Statute (20 U.S.C. § 1054(g)), and Conflicts with Other Decisions From Within and Outside the First Circuit.

1. The Court's Decision Violates the Anti-Cutback Statute.

By restricting review to Hancock's post-claim "interpretation" of the so called 1995 Restatement, and barring review of the 1994 Amendment, the SPDs, or other surrounding evidence, the Court allows Hancock to deny early retirement benefits that have already accrued. This violates ERISA's anti-cutback statute, 29 U.S.C. § 1054(g)("The accrued benefit of a participant under a plan may not be decreased by. . . eliminating or reducing an early retirement benefit.").n1

The facts tell the story. On October 11, 1994, Hancock approved an amendment to the Pension Plan. A01362-63 (the "1994 Amendment"). The 1994 Amendment effected a "liberalization" to the Pension Plan by guaranteeing "unreduced pension benefits ... for anyone with at least 25 years of service." A01570, A02015. The 1994 Amendment plainly stated that all

"Participants" with 25 years of service "shall be entitled" to a full pension payable commencing at age 56 without having to meet any other eligibility criterion. A01362. Commensurate with adopting the 1994 Amendment, Hancock launched a blitz of communications to inform Participants of their new rights. In each such communication, Hancock plainly stated that Participants with 25 years of service would henceforth qualify for a full pension at age 56, without any other conditions imposed. A01570 (Speech by Hancock Chairman/CEO Stephen Brown); A01549 (letter to all employees); A01553 ("Early Retirement Guide"); A01264 (SPD). Hancock further promised that the new rule would apply to all "retirements or terminations after January 1, 1995." A01264, A01290, A01550, A01552.

As Appellees achieved 25 years of service, their right to an unreduced pension at age 56 accrued and became protected by the anti-cutback statute, 29 U.S.C. § 1054(g). See Campbell v. BankBoston, 327 F.3d 1, 8 (1st Cir. 2003) ("The ERISA anti-cutback provision protects against the erosion of 'accrued benefits'"), See also, e.g., Bellas v. CBS, Inc., 221 F.3d 517, 524 (3rd Cir. 2000) ("There is no question but that a standard early retirement benefit, provided exclusively upon the satisfaction of certain age and/or service requirements, is an accrued benefit that is protected by [29 U.S.C. § 1054(g)]."); Herzberger v. Standard Ins. Co., 205 F.3d 327, 332-33 (7th Cir. 2000) ("An employer should not be allowed to get credit with its employees for having an ERISA plan that confers solid rights on them and later, when an employee seeks to enforce the right, pull a discretionary judicial review rabbit out of his hat."); Williams v. Cordis Corp., 30 F. 3 d 1429, 1431 (11th Cir.

1994) (anti-cutback rule "prevent[s] employers from 'pulling the rug out from under' employees participating in a plan").

After learning their employment would soon be terminated as part of the sale of their employing unit to another company, Appellees submitted claims for unreduced pension benefits at age 56. Hancock denied the claims based upon a new "interpretation" of the 1995 Restatement. This lawsuit followed.

The District Court carefully reviewed of the 1995 Restatement, both standing alone and when viewed in context of the 1994 Amendment, the SPDs, and other relevant evidence, finding Hancock's "interpretation" untenable:

> "The Administrator's interpretation ... renders substantial portions of §§ 4.3(B) and 8.1(A) [of the 1995 Restatement] superfluous and imports a definition of 'employee' that is inconsistent with its use elsewhere in the Plan. It is further inconsistent with the reading given to the Plan by Hancock's own CEO and its Human Resources Department ... [O]bstinacy in error is the soul of capriciousness."

Dist. Ct. Op. at 17.

In reversing, the Court held that the District Court should not have reviewed any documents save for the 1995 Restatement: "With the governing plan document identified, extraneous documents are

irrelevant to our determination of the former employees' right to relief under Count I" Slip Op. at 12. The problem with such streamlined review, however, is that it allows Hancock - under the guise of "interpreting" the 1995 Restatement - to deny early retirement benefits that have already accrued, in violation of the anti-cutback statute, 29 U.S.C. § 1054(g).

In Cent. Laborers' Pension Fund v. Heinz, the Supreme Court held that the anti-cutback statute bars pension plan amendments that reduce eligibility for early retirement benefits that have already been "earned by service." 541 U.S. 739, 124 S. Ct. 2230, 2235 (2004). n2 The Supreme Court clarified that only new "conditions set before a benefit accrues can survive the anti-cutback rule." Id.

As held by the District Court, the record in this case proves that Hancock's new "interpretation" flatly contradicts its initial intent in approving and publishing the 1994 Amendment, as well as its prior interpretation of the 1994 Amendment both before and after the 1995 Restatement was created (see Subsection 5, below). n3 Accordingly, rehearing is required.

2. The Court's Decision Creates a Split Within the First Circuit.

By holding that 29 U.S.C. § 1132(a)(1)(B) mandates review restricted only to the 1995 Restatement - and nothing else, the Court has created a split of authority within this Circuit. In another recent decision under § 1132(a)(1)(B), this Court called for

case-by-case evaluation of the "weight and admissibility" of other plan-related document:

> "Such documents are most likely to be relevant where they have been authenticated, have been generated or adopted by the plan administrator, concern the policy in question, are timely to the issue in the case, are consistently used, and were known. . . by those who made the decision to deny the claim. Where a plan administrator has chosen consistently to interpret plan terms in a given way, that interpretation is relevant in assessing the reasonableness of the plan administrator's decision."

Glista v. UNUM Life Ins. Co., 378 F.3d 113, 123 (1st Cir. 2004), *citing* Doe v. Travelers Ins. Co., 167 F.3d 53, 57 (1St Cir. 1999).

Contrary to the plain holding of Glista, this Court uses a per se rule that only one document - the 1995 Restatement - can be considered. The Court also ignores other ERISA authorities confirming the reviewing court's authority, when construing underlying plan documents, to review (at least) the relevant SPDs. See Pl. Br., 20 n. 9, *citing* (inter alia) Matthews v. Sears Pension Plan, 144 F.3d 461, 468 (7th Cir. ("[SPDs are] a presumptively reliable guide to the contents of the plan itself."), cert. denied, 525 U.S. 1054 (1998). n4

The important legal principles involved overshadow any factual differences existing between

this case and Glista. As a result, District Courts (and plan participants) now lack clear guidance in this area. Rehearing is thus required.

3. The Court's Decision Conflicts with the "Grow Into" Rule.

Hancock's post-claim interposition of an "active service at age 50" requirement violates the established rule that Appellees should be allowed to "grow into" their early retirement benefits:

> "The courts of appeals that have ruled on an employee's right to 'grow into' early retirement benefits have ... uniformly held that as long as an employee satisfies, or will be able to satisfy, the eligibility requirements of the early retirement benefit in effect prior to the amendment [here, a reinterpretation], § 204(g) protects the benefit."

Ahng v. Allsteel, Inc., 96 F.3d 1033, 1036 (7th Cir. 1996). Accord Gillis, *supra*, 4 F.3 d at 1145 ("an employer must provide funding for early retirement benefits if there is the possibility that its employees will 'grow into' these benefits at a date after its early retirement plan is eliminated") (emphasis added).

Where, as here, early retirement benefits based upon service time have accrued but are not payable until the participant reaches a specified chronological age, the participant must be allowed to reach that age without losing the benefit:

> "For example, assume Company X provides early retirement benefits upon reaching fifty-five years of age and twenty years of service. . . . If Smith is only forty-five and has not yet met the age requirement Company X still may not amend the benefits. Smith must e given an opportunity to 'grow into' his benefits."

Giannotti, Comment: ERISA's Anticutback Rule and Contingent Early- Retirement Benefits, 68 U. Chi. L. Rev. 1341, 1346 (Fall, 2001).

Rehearing is required to reconcile this case with the "grow into" rule.

4. The Court Based its Decision Upon Demonstrably Incorrect Findings Concerning Integration and Ambiguity.

To further support its restricted review, the Court entered findings that the 1995 Restatement (1) was an "integrated" document, and (2) was devoid of any ambiguity. Slip Op. at 11, 12. The record contradicts both of these findings.

The Court held that the 1995 Restatement "includes all of the amendments through January 1 of that year." Slip Op. at 11. As demonstrated during briefing, however, the 1995 Restatement omitted or misstated both the 1994 Amendment, and an unrelated Plan amendment approved by Hancock later in 1994 (December). Pl. Br. at 45. In its reply brief, Hancock did not offer any rebuttal, thus conceding the point. See

United States v. Teague, 956 F.2d 1427, 1433 (7th Cir. 1992)

Footnotes

n1 The anti-cutback statute was enacted in 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984), for the express purpose of protecting early retirement benefits. E.g., Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1143-46 (3rd Cir. 1993) (in-depth discussion of statute and its history), cert. denied, 511 U.S. 1004 (1994).

n2 The Court also rejected as "constricted" an interpretation of the anticutback statute to permit benefits to be "suspended" post-accrual. Id., 124 S. Ct. at 2236, 2239 n. 5 (suspension allowed only for benefits based on "future" service).

n3 Of course, Hancock remained free to amend the Plan to include the "active service at age 50" requirement for Participants whose rights had not accrued because they had not yet achieved 25 years of service, which it did on December 10, 1997. A01426 ("... assuming he continued to be Employee until such date...."). See also A01531-32 (1998 SPD Update: "If you are working as a John Hancock Associate when you first become eligible for retirement....").

n4 As held by the District Court, deliberate disregard of the SPDs is "an ERISA sin." Dist. Ct. Op. at 13-14, *citing* 29 U.S.C. § 1022(b) (the SPD must include all information that "may result in disqualification, ineligibility, or denial or loss of benefits"), and 29 C.F.R. § 2520-102-2(b) (same).